CHAPTER 16

MAY, 2011

# *Discovery*

*Written by Eric Blumenson* [*]

*Table of Contents:*




[*] With thanks to John Brooks for research assistance. Portions of this chapter are republished or adapted from the memoranda and Reporter's Notes prepared by the author in his role as Reporter to the SJC's Standing Advisory Committee on the Criminal Rules during its drafting of the revisions to Rule 14 that were adopted in 2004.

*Cross-References:*
Bill of particulars, § 20.5
District court, discovery in, § 3.4
Form and requirements of motions generally, § 15.3
Investigation, ch. 11
Lost evidence – mug shots used in pretrial identification, § 18.8B
Motion for new trial based on newly discovered evidence, § 44.4H
Motion in limine, § 34.2
Objections to compelled production, § 13.4
Summoning witnesses, ch. 13

# PART I: DISCOVERY GENERALLY

## §16.1 THE 2004 OVERHAUL OF DISCOVERY RIGHTS AND PROCEDURES

Rule 14 was amended in 2004, crafting a major overhaul of discovery rights and procedures for cases brought after Sept. 6, 2004.[1] Prior to that revision, Rule 14 made most items matters of "discretionary discovery," requiring motions for even the most routine items (although the district courts had adopted certain automatic procedures in 1993[2]). The 2004 amendments instituted a new regime of mandatory discovery to both sides, generally obviating the necessity of filing motions to obtain those categories of discovery which had been commonly afforded in practice. Rule 14(a) now makes both defense and prosecutorial discovery of commonly discoverable items automatic—without the necessity of filing motions or obtaining a court order.[3] The defendant's automatic discovery obligations begin only after the Commonwealth has delivered all discovery to the defense,[4] and each party is to file a Certificate of Compliance after its delivery of the discovery then due.[5] The items subject to automatic discovery are described *infra* at section 16.2A (discovery to the defense) and 167 (discovery to the prosecution), Detailed discovery rights to particular items, under both the rule and case law, are found *infra* at section 16.6.

[1] Rule 14's revised procedures apply to cases initiated by complaint or indictment on or after September 7, 2004, Mass. R. Crim. P. 14. For cases initiated by complaint or indictment before September 7, 2004, the prior version of Mass. R. Crim. P. 14 controls. *See* Commonwealth v. Durham, 446 Mass. 212 (2006)(applying pre-revision Rule 14).

[2] Mandatory discovery had come earlier to the district court as part of the 1993 legislation that ended the *de novo* system. M.G.L. c. 218 § 26A. Under BMC/Dist. Ct. rule 3(a), the defendant's criminal record and police reports must be *given* at arraignment, and under Rule 3(c) an order for other discovery pursuant to c. 218 § 26A must be *issued* at arraignment. Rule 14's amendments thus had greater impact in Superior Court, which prior to 2004 had maintained a motions-based discretionary discovery regime.

[3] *See* Reporter's Notes to Mass. R. Crim. P. 14..

[4] Mass. R. Crim. P. 14(a) (1)(B)

[5] Mass. R. Crim. P. 14(a)(3).

The rule's automatic discovery obligations have the force and effect of a court order, so that failure to provide a required item "may result in application of any sanctions permitted for non-compliance with a court order under subdivision 14(c)."[6] However, Rule 14 also provides a potential escape hatch from these automatic obligations: Under Rule 14(1)(C), a party may seek a protective order against discovery of any such items where special circumstances in the case would warrant divergence from the presumptive procedures, in which case the automatic discovery of that item is stayed pending resolution of the issue.

Discovery of items not included in the automatic discovery regime remains subject to the court's discretion, and may be requested by pretrial motion. Such motions must conform to the deadlines now contained in revised Rule 13(d).

There were additional significant revisions to discovery procedures in the 2004 amendments which are described in detail *infra*. They include (1) a description of the scope of the prosecutor's obligations to obtain material from police and others;[7] (2) a more inclusive definition of "statement";[8] (3) a provision allowing ex parte argument in support of a motion for discovery in appropriate cases;[9] (4) a provision requiring the Commonwealth to provide notice of otherwise discoverable material that is in non-party hands and thus not subject to Rule 14 discovery, and an option for the defendant to move for a preservation of evidence order;[10] and (5) options for a party to waive particular discovery rights, and for agreements between the parties altering particular requirements of Rule 14.[11]

The automatic discovery procedure was promulgated for two reasons. First, requiring motions and hearings to obtain basic discovery was unnecessarily delaying cases, and absorbing court and counsel time and expense.[12] Second, "automatic discovery early in the case provides the defense with notice of the Commonwealth's case prior to plea negotiations or the filing of other pretrial motions."[13] Counsel should not be expected to discuss the possibility of a plea without pretrial discovery, nor should counsel be expected to file pretrial motions, such as a motion to suppress, without the benefit of discovery.

## §16.2 DISCOVERY PROCEDURE UNDER RULE 14

### 16.2A. TIMING AND SCOPE OF DISCOVERY

Rule 14(a) sets out the automatic discovery obligations of both the defendant14 and prosecution.[15] Although no motion or individual court order is involved, the rule's automatic discovery obligations have the force and effect of a court order, including enforceability by the same sanctions.[16]

Two caveats are important, however. First, if a party believes good cause exists for non-discovery of an item listed as automatic discovery, it may move for a protective order,[17] which automatically stays discovery of the item pending resolution by the court.

---

[6] Mass. R. Crim. P. 14 (a)(1)(C).

[7] Mass. R. Crim. P. 14(a)(1)(A). *See infra* § 16.3A.

[8] Mass. R. Crim. P. 14(d). *See infra* § 16.3E.

[9] Mass. R. Crim. P. 14(a). *See infra* § 16.2A(5)

[10] Mass. R. Crim. P. 14(a)(1)(E). *See infra* § 16.3B.

[11] Mass. R. Crim. P. 14(a)(8). *See infra* § 16.2D.

[12] Reporter's Notes to Mass. R. Crim. P. 14.

[13] Reporter's Notes to Mass. R. Crim. P. 14.

[14] Mass. R. Crim. P. 14(a)(1)(A)

[15] Mass. R. Crim. P. 14(a)(1)(B)

[16] Mass. R. Crim. P. 14 (a)(1)(C).

Second, as time elapses, case law may provide broader discovery rights than Rule 14, so a reading of Rule 14 alone can be misleading. Statutory- and caselaw-based rights to specific categories of discovery are more fully detailed infra in parts II and III of this chapter.

Additionally, Rule 14(b) requires the defense to provide particular additional discovery in cases involving defenses of alibi, mental impairment, license, authority, or exemption.

The following subsections simply summarizes the mandated discovery obligations of each party respectively under Rule 14(a) and (b), in order of the deadlines each side confronts.

### 1. Defendant's automatic discovery rights

Rule 14(a)(1)(a) sets out the following obligations on the Commonwealth and the court to effectuate automatic discovery for the defense:

*At arraignment*, the court is to order the Probation Department to deliver to the parties the record of all complaints and dispositions garnered by the defendant(s) and all Commonwealth witnesses, within five days of the Commonwealth's identification of these individuals.[18] At arraignment, the court also sets a date for the pretrial conference.[19]

*At or prior to the pretrial conference,* the Commonwealth must provide the defendant discovery of specifically enumerated items that are (a) relevant to the case, and (b) in the prosecutor's custody or control.[20] If the Commonwealth has produced all of its required discovery at this time, it should file a *Certificate of Compliance* affirming its satisfaction of its 14(a)(1) obligations and listing the items provided.[21]

The specific automatic discovery items enumerated in Rule 14(a)(1) are discussed individually and in detail *infra* at § 16.6. As written in the rule, they are:

> (i) Any written or recorded statements, and the substance of any oral statements, made by the defendant or a co-defendant.
>
> (ii) The grand jury minutes, and the written or recorded statements of a person who has testified before a grand jury.
>
> (iii) Any facts of an exculpatory nature.
>
> (iv) The names, addresses, and dates of birth of the Commonwealth's prospective witnesses other than law enforcement witnesses. The Commonwealth shall also provide this information to the Probation Department.
>
> (v) The names and business addresses of prospective law enforcement witnesses.
>
> (vi) Intended expert opinion evidence, other than evidence that pertains to the defendant's criminal responsibility and is subject to subdivision (b)(2). Such discovery shall include the

[17] Mass. R. Crim. P. 14 (a)(1)(C) and (a)(6).

[18] Mass. R. Crim. P. 14(a)(1)(D). The Commonwealth's is obligated to provide the names, addresses, and birthdates of its witnesses to both the defense and Probation Department under automatic discovery rule 14(a)(1)(A)(iv).

[19] Mass. R. Crim. P. 11(a). While the rule mandates the pretrial conference and pretrial hearing be held on separate dates, in practice these two events are often held simultaneously in the district courts. Arraignment, the pretrial conference, and the pretrial hearing are discussed *supra* at chs. 7, 14 and 15 respectively.

[20] Mass. R. Crim. P. 14(a)(1)(A). The pretrial conference is also the time to discuss remaining discovery not yet produced, whether the Commonwealth intends to use prior acts or convictions of the defendant, and all other matters that the parties have not agreed to and that will be raised by motion. The parties are then to execute a pretrial conference report which controls the scope of subsequent motions practice. *See supra* Ch. 14, on the pretrial conference.

[21] Mass. R. Crim. P. 14(a)(3)

identity, current curriculum vitae, and list of publications of each intended expert witness, and all reports prepared by the expert that pertain to the case.

(vii) Material and relevant police reports, photographs, tangible objects, all intended exhibits, reports of physical examinations of any person or of scientific tests or experiments, and statements of persons the party intends to call as witnesses.

(viii) A summary of identification procedures, and all statements made in the presence of or by an identifying witness that are relevant to the issue of identity or to the fairness or accuracy of the identification procedures.

(ix) Disclosure of all promises, rewards or inducements made to witnesses the party intends to present at trial.

### 2. Commonwealth's rights to automatic reciprocal discovery and to discovery concerning certain defenses

*Following Commonwealth's filing of its Certificate of Compliance,* certain discovery must be provided to the prosecution pursuant to terms and schedules contained in Rule 14(a)(1)(B)(reciprocal discovery) and 14(b)("special procedures"). Constitutional provisions establishing the burden of proof and the defendant's privilege against self-incrimination require that discovery to the prosecution take place only after the defense has received its discovery.[22] Therefore, the defendant's obligations to provide discovery do not commence until after the Commonwealth has certified its delivery of all mandated discovery to the defense.

After that point, the defense is subject to the discovery obligations. Failure to comply may in some cases preclude use of the undisclosed evidence. In brief, these obligations fall into the following five categories (which are described in detail infra at § 16.7 and 16.8):

*(1) Reciprocal discovery* to the Commonwealth, on a date agreed to by the parties (or in the absence of agreement, by the court) of (1) material and relevant evidence (2) that falls within the subdivisions (a)(1)(A)(vi), (vii), and (ix)(see immediately above), as well as the names, addresses, dates of birth, and statements of its non-defendant witnesses, (3) but only if the defense intends to offer that evidence at trial.[23]

*(2) Special procedures* governing particular defenses, if applicable:

*(a) Alibi:* Following a prosecution motion for discovery of alibi which states the time, date and place at which the alleged offense was committed, the court may order the defendant to serve written notice whether she intends to offer an alibi defense, and if so, notice of the place(s) where she claims to have been and the names and addresses of any alibi witnesses. Within seven days of the defendant's alibi notice, the prosecution must provide written notice of the names and addresses of witnesses who will place the defendant at the scene or otherwise rebut the alibi. Failure of either party to provide this discovery may result in exclusion of the undisclosed witness' testimony, excepting the defendant.[24]

*(b) Mental health defense:* A defendant who intends to rely at trial on a defense or other claim based on the condition of his mental health must provide the prosecution with notice (i) whether he intends to offer testimony of expert witnesses on the issue of his mental condition, (ii) the names and addresses of any such expert witnesses, and (iii) whether expert witnesses will rely on statements of the defendant as to his mental condition.[25] The defendant can then in some circumstances be ordered to

[22] *See infra*, § 16.8

[23] Mass. R. Crim. P. 14(a)(1)(B). The third prerequisite is addressed *infra* at § 16.8A.

[24] Mass. R. Crim. P. 14(b)(1). This subject is more fully addressed *infra* at § 16.7D.

[25] Mass. R. Crim. P. 14 (b)(2)(A). This criminal rule is in large part a codification of the practice established by the S.J.C. in Blaisdell v. Commonwealth, 372 Mass. 753, 767 (1977) (state may constitutionally require advance notice of an intended insanity defense).

undergo an examination by a Commonwealth psychiatrist, subject to strict limits contained in the provision.[26]

*(c) defense based on a license, claim of authority or ownership, or exemption:* The defendant must give written notice to the Commonwealth of her intent to defend on the basis of license, claim of authority or ownership, or exemption. [27]

*(d) self-defense based on claim victim first aggressor:* A 2012 amendment to Rule 14 requires the defendant to give notice and certain information to the prosecution if she intends "to introduce evidence of the alleged victim's specific acts of violence to support an allegation that he or she was the first aggressor."[28] After receiving this notice, the prosecution is obligated to provide the defense with certain information regarding its rebuttal evidence and witnesses.[29]

### 3. Certificate of Compliance

Each party must file a Certificate of Compliance when it has met its automatic or court-ordered discovery obligations (other than disclosure of expert reports, which may be written late in the case). The certificate must identify each item provided.[30] The certificate is properly filed when, to the best of its knowledge and after reasonable inquiry, the party has provided discovery of all covered items it *then* has. The provision recognizes that additional discovery will likely occur as new information and witnesses are obtained, and mandates supplemental certificates for that purpose.[31]

### 4. The pretrial hearing and (possible) compliance hearing

Under Rule 11, the parties are required to attend a *pretrial hearing,* at which (assuming the case is not disposed at that time by plea or otherwise) the court is to hear any pending discovery motions and also determine whether compliance with all discovery orders has been accomplished.

If the pretrial report is complete and all discovery obligations have been fulfilled, the court may assign a trial date; otherwise, the court is to order a *compliance hearing.*[32] A compliance hearing is limited to three court actions:

(1) determining whether the pretrial conference report and discovery are complete and, if necessary, hearing and deciding discovery motions and ordering appropriate sanctions for non-compliance;

(2) receiving and acting on a tender of plea or admission; and

(3) if the pretrial conference report and discovery are complete, obtaining the defendant's decision on waiver of the right to a jury trial, and scheduling the trial date or trial assignment date. [33]

### 5. Discovery by Motion

*Motions for discovery:* Although most discovery is made automatic under the rule, there may be additional items not encompassed by Rule (a)(1)(A) that are properly discoverable. Rule 14(a)(2)

[26] Mass. R. Crim. P. 14(b)(2). This subject is more fully addressed *infra* at § 16.7B.

[27] Mass. R. Crim. P. 14(b)(3). This subject is more fully addressed *infra* at § 16.7C.

[28] Mass. R. Crim. P. 14(b)(4)(A).

[29] Mass. R. Crim. P. 14(b)(4). This subject is more fully addressed *infra* at § 16.7E.

[30] Mass. R. Crim. P. (a)(3).

[31] Id.

[32] Mass. R. Crim. P. 11(b)(2)(iii).

[33] Mass. R. Crim. P. 11(c).

provides for motions to discover such material. Such a motion may only be made for discovery of material and relevant evidence that is not encompassed by the automatic discovery provisions; if items in the latter category are not produced, the proper response is to file a motion to compel discovery or, in an appropriate case, a motion for sanctions under (a)(1)(C).

The timing and deadlines for discovery motions are asymmetrical between the parties: because the Commonwealth must provide discovery first, subdivision (a)(2) provides that the Commonwealth may file a motion for discovery only after it has filed a Certificate of Compliance. Apart from this, discovery motion deadlines are set out in Rule 13(d)(1). It provides that discovery motions must be filed before the conclusion of the pretrial hearing, or after for good cause shown. There are two specific, non-exhaustive circumstances that are always deemed good cause. One is when the discovery sought could not reasonably have been requested or obtained before the pretrial hearing.[34] The other allows later filing by the Commonwealth if it "could not reasonably provide all discovery due to the defense prior to the conclusion of the pretrial hearing." As the Reporter's Notes of Rule 13 suggest, this provision is necessary because according to the rules, the Commonwealth must first fulfill its discovery obligations before it can receive discovery. Thus if the Commonwealth has been unable to provide discovery before the pretrial hearing for good reason, the Commonwealth's reciprocal discovery rights should not be prejudiced by being barred.[35] These are non-exhaustive grounds; other reasons may also count as the "other good cause" mentioned in the provision.[36]

*Ex parte arguments in support:* Rule 14(a)(8) allows a party to move for the opportunity to support or oppose a Rule 14 motion by means of a written statement to be inspected by the judge alone. The statement must be sealed and preserved for inspection by the appellate court in the event of an appeal.

*Drafting and arguing motions:* Counsel may want to consider the following suggestions:

1. Do not rely on boilerplate, but tailor motions to what is necessary or helpful in the case. In some instances, unusual discovery methods may be justified, such as a Rule 35 deposition, calling witnesses to court for remedial instruction that they may speak with counsel, and so on.

2. Because specificity is required to fully safeguard the defendant's rights to exculpatory evidence, motions for discovery and their accompanying affidavits should be framed to identify with specificity all items suspected to exist in the case. For example, in a case involving self-defense, counsel should move for discovery of all evidence of the alleged victim's threats, possession of weapons, prior acts of violence or reputation for violence, etc.

3. In more problematic requests, counsel should demonstrate that the item exists,[37] is needed for particular reasons, and is unobtainable without the order. For example, in particular cases counsel might argue that the charge is not specific, such as disorderly conduct or conspiracy over a long period; the alleged crime occurred in prison, where investigation is quite limited; counsel has reason to believe that the statement sought contradicts the present posture of the case; Commonwealth witnesses refuse to talk to defense counsel; the items are specific and simple to supply, and so on.

4. Argument should rely not only on the substantive grounds that guarantee discovery of a particular item, but also on the clear preference for open discovery enunciated in the Reporter's Notes as the intention of Rule 14. As the Supreme Judicial Court has stated, "in our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a

[34] Mass. R. Crim. P. 13(d)(1)(A).

[35] Mass. R. Crim. P. 13(d)(1)(B).

[36] Mass. R. Crim. P. 13(d)(1)(C)

[37] Commonwealth v. Hall, 369 Mass. 715, 724 (1976) (defendant on appeal has burden of showing, by agreement if possible, otherwise by evidence, the existence of the records). *Accord* Commonwealth v. Borans, 379 Mass. 117, 153 (1979).

storehouse of relevant facts."[38] The Appeals Court has held that the broadest interpretation governs discovery where case law and Rule 14 conflict.[39]

5. If the motion is denied pretrial, counsel should renew the motion at trial when additional rights may accrue, either under the confrontation clause [40] or under other discovery bases.[41] Cases have found waiver from the failure at trial to renew a motion to produce evidence.[42]

## 16.2B. CONTINUING DUTY

Rule 14 provides that the parties have a continuing duty to promptly provide automatic or other ordered discovery as additional information is acquired.[43] This duty applies during as well as before trial[44] and includes an obligation to correct previously delivered discovery that turns out to be inaccurate.[45] The prosecutor also has a continuing constitutional duty to reveal material exculpatory evidence acquired before or *after* a conviction.[46]

[38] Commonwealth v. Stewart, 365 Mass. 99, 105 (1974) (citing Dennis v. United States, 384 U.S. 855, 873 (1966)). The Supreme Court has found discovery important to assure the defendant a full and fair opportunity for investigation and searching cross-examination. Jencks v. United States, 353 U.S. 657 (1957); Gordon v. United States, 344 U.S. 414 (1953). *Cf.* Taylor v. Illinois, 484 U.S. 400 (1988) (justifying limited use of the preclusion sanction for violation of prosecutorial discovery; "discovery, like cross examination, minimizes the risk that a judgment will be predicated on incomplete, misleading or even deliberately fabricated testimony").

Additionally, the defendant will find additional advisory support for disclosure of all commonly sought items in ABA Standards for Criminal Justice: Discovery and Procedure before Trial, Standard 11-2.1.

[39] Commonwealth v. Lapka, 13 Mass. App. Ct. 24, 30–31 (1982).

[40] The Supreme Court has found that the confrontation clause does not support pretrial discovery because it is solely a trial right. Pennsylvania v. Ritchie, 480 U.S. 39 (1987). *But see* Commonwealth v. Stockhammer, 409 Mass. 867, 881 (1991) (discovery right upheld following defense argument grounded in part in confrontation clause).

[41] See infra § 16.5

[42] Commonwealth v. Hall, 369 Mass. 715, 727 (1976); Commonwealth v. Lewinski, 367 Mass. 889, 901 (1975).

[43] Mass. R. Crim. P. 14(a)(4) (continuing duty generally); 14(b)(1)(C) (continuing duty under notice-of-alibi order).

[44] Commonwealth v. Frith 458 Mass. 434, fn. 4 (2010) (both defense and prosecution have continuing duty); Commonwealth v. Molina, 454 Mass. 232 (2009) (disclosure of informant's status four days into trial); Commonwealth v. Daniels, 445 Mass. 392, 401-404 (2005); Commonwealth v. Costello, 392 Mass. 393 (1984); Commonwealth v. Cundriff, 382 Mass. 137 (1980); Commonwealth v. Gilbert, 377 Mass. 887, 893 (1979); Commonwealth v. Howard, 8 Mass. App. Ct. 318 (1979).

[45] Commonwealth v. Borans, 379 Mass. 117, 153 (1979); Commonwealth v. Gilbert, 377 Mass. 887, 893 (1979) (party "should not subvert . . . discovery by leaving in the hands of an adversary, without due notice or amendment, a document known to be in effect largely superseded"). *See also* United States v. Formanczyk, 949 F.2d 526 (1st Cir. 1991) (government had duty to inform defense that informant had reentered country since discovery response).

[46] Imbler v. Pachtman, 424 U.S. 409, 427 (1976). *See also* Commonwealth v. Caillot 454 Mass. 245 (2009); Commonwealth v. Clemente, 452 Mass. 295 (2008); Commonwealth v. Laguer 448 Mass. 585 (2007); Commonwealth v. Daniels, 445 Mass. 392 (2005) (despite trial court's denial of defendant's discovery motion, Commonwealth had continuing duty to review the materials specifically requested by defendant and disclose any favorable evidence).

## 16.2C. PROTECTIVE ORDERS; AMENDMENT OF ORDERS

Although Rule 14(a) provides for automatic, mandatory discovery, if disclosure of an item would pose a risk of danger or abuse, or violate a privilege, discovery need not be granted.[47] If a party has good cause for declining to provide an item of discovery, it should move for a protective order under Rule 14(a)(6); doing so automatically stays production of the item pending a ruling by the court.[48] On a sufficient showing, this provision authorizes the court to issue a protective order that denies, restricts, or defers discovery; alters the time requirements of Rule 14; or limits discovery to the attorney personally. Similarly, subsection (a)(7) authorizes the court to amend a discovery order in these respects or "as the interests of justice may require."

Subsection (a)(6) also makes explicit that the identity of the moving party does not affect who bears the burden of proof. It is most often the case that the party opposing discovery must show why the discovery should be denied, but sometimes that is not the case. For example, where certain privileges may apply, the party seeking disclosure has the burden of showing that they do not, or are overridden.

The Commonwealth will commonly move for a protective order against disclosure of information it believes would put the safety of a witness at risk[49] or jeopardize an ongoing investigation.[50] Protective order motions may also be grounded on statutes that allow victims and witnesses to request that their identities not be made public,[51] that provide a basis for limiting disclosure of grand jury minutes to counsel only in some circumstances,[52] and that prohibit police and court officials from disseminating the names of sexual assault complainants to the public.[53] CPCS

[47] See Commonwealth v. Holliday, 450 Mass. 794, 802-3 (2008)(it is constitutionally permissible "to impose limits on pretrial discovery in criminal cases to ensure the safety of witnesses, so long as such limits do not deny the defendant his right to the effective assistance of counsel and a fair trial," citing United States v. Randolph, 456 F.2d 132, 135–136 (3d Cir.1972)).

[48] Mass. R. Crim. P. 14(a)(1)(C).

[49] *See, e.g.,* Commonwealth v. Holliday, 450 Mass. 794 (2008); Commonwealth v. Rivera, 424 Mass. 266, 269–72 (1997); Commonwealth v. French, 357 Mass. 356, 399 (1970). When the danger to witness safety is inherent in the situation, the Commonwealth does not need to demonstrate a specific or actual threat. Holliday, *supra* at 803-04, citing Commonwealth v. Francis, 432 Mass. 353, 357–358 (2000)(in murder case involving rival gangs, judge properly found threat to safety of Commonwealth's witness inherent in situation, which relieved Commonwealth of burden to demonstrate actual threat to witness), Commonwealth v. Cobb, 379 Mass. 456, 469–470 (1980), and Commonwealth v. Johnson, 365 Mass. 534, 545, 313 N.E.2d 571 (1974) (in some circumstances, threat is inherent and would not require specific demonstration).

[50] *See, e.g.*, Commonwealth v. Dew, 443 Mass. 620 (2005) (court has discretion to limit the disclosure of grand jury minutes to defense counsel). . .

[51] G.L. c. 258B, § 3(h), which, "[w]hen such a request is granted by the court, . . . prohibits the prosecutor, defense counsel, and other, *except when discussing the matter among themselves, from disclosing in open court* the witness's residential and work addresses and other specified information. The court may make further orders to maintain limited disclosure of the information." It is clear that the statute is not intended to prevent defense access to witnesses, but rather to protect the witness's privacy and security from threats by the public." Bennett, "Prosecutorial Misconduct: How to Protect Your Client and Strategies to Fight It When It Rears Its Ugly Head in Your case," *CPCS Annual Training Conference Materials,* at 7 (Nov. 14, 1997) (emphasis in original).

[52] Under G.L. c. 268 §13(d), if the Commonwealth demonstrates that the defendant is accused of a violent crime and that, based on specific and articulable facts, the defendant poses a threat to the victim or witness, the court may issue a protective order precluding defense counsel from distributing grand jury minutes to a defendant.

[53] *See* G.L. c. 265, § 24C. "This statute in no way authorizes the Commonwealth to withhold such information from the defendant who is a party to the proceeding and not merely a member of the public." Bennett, "Prosecutorial Misconduct: How to Protect Your Client and Strategies to Fight It When It Rears Its Ugly

advises that when the Commonwealth "claims that there is a 'security issue,' counsel should consider requesting a hearing to establish whether a genuine security issue exists and what steps should be taken to accommodate that concern while assuring that the defendant's rights are not violated."[54] In this connection it is worth noting that safety issues may be dealt with by ordering a supervised deposition of the witness instead of discovery of the address;[55] and that during cross-examination at trial, the defendant has an additional sixth amendment confrontation right to obtain the address of the witness, absent safety considerations.[56] Except in highly unusual cases, names and addresses should be discoverable; as the Supreme Judicial Court has noted, the defendant's constitutional rights often depend on her counsel's ability to interview prosecution witnesses in advance of trial.[57] *See infra* § 16.6F(6) (access to witnesses).

### 16.2D. WAIVERS AND AGREEMENTS TO ALTER DISCOVERY RIGHTS.

Under subsection (a)(8), the parties may alter the scope and/or timing of discovery, either by agreement or by one party's waiver. The waiver or agreement must be in writing, signed by the waiving party or the parties to the agreement, identify the specific items included, and be served upon all parties.

## §16.3 LIMITATIONS ON THE REACH OF RULE 14; SUMMONSES

[*See also* § 16.2C, *supra*, concerning protective orders]

Head in Your Case," *CPCS Annual Training Conference Materials* at 7 (Nov. 14, 1997). Additionally, there is a statutory bar to disclosure of the location of any domestic violence victims' program or rape crisis center. G.L. c. 233, § 20L.

[54] Krupp et al. CPCS Training Bulletin 13–14 (June 1997). *See* Commonwealth v. Rivera, 424 Mass. 266, 269–72 (1997) (addresses of three prosecution witnesses kept secret for "security reasons," and defense given access by telephone from D.A.'s office, citing Commonwealth v. Cobb, 379 Mass. 456, 469–70 (1980) (because witnesses were made available for interview, and possible safety threat, denial of addresses was within court's discretion, citing Commonwealth v. MacDonald, 368 Mass. 395, 397 (1975)), *judgment vacated in part sub nom.* Massachusetts v. Hurley, 449 U.S 809 (1980), *appeal dismissed sub nom.* Commonwealth v. Hurley, 382 Mass. 690 (1981), *appeal reinstated,* 391 Mass. 76 (1984); Commonwealth v. French, 357 Mass. 356, 399 (1970).

[55] The Reporter's Notes to Rule 14(a)(1)(A)(iv) suggest that if, "after a witness' identity and address have ~~has~~ been disclosed, the court is advised that his safety is endangered, there is provision in Mass. R. Crim. P. 35 for the perpetuation of testimony. Once a witness' testimony is recorded, little reason remains for the defendant to attempt to intimidate him."

[56] Commonwealth v. Johnson, 365 Mass. 534, 544, 547–48 (1974) (reversed because witness would not divulge identities of other witnesses and judge did not weigh interests of safety versus need); Commonwealth v. McGrath, 364 Mass. 243, 250–52 (1973).

[57] *See* Commonwealth v. Balliro, 349 Mass. 505, 517–18 (1965) ("To say that a defendant has a right to present his defense and then to deprive him of the means of effectively exercising that right would reduce the guarantee to an idle gesture. . . . It is too plain to be labored that the interviewing of prospective witnesses is an essential part of the preparation of a case for trial"). See *also* Commonwealth v. Benoit, 389 Mass. 411 (1983) (defendant should have been given opportunity to interview witness in Commonwealth custody before calling him as witness, but harmless error).

## 16.3A. RELEVANT EVIDENCE WITHIN "CONTROL" OF THE PARTY

Discovery of certain items and information commonly afforded in practice has been made automatic provided such information is "relevant" and in the "…possession, custody or control of the prosecutor, persons under the prosecutor's direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecutor's office or have done so in this case."[58]

*"Relevant":* The duty to disclose extends only to information that is relevant.[59] If the defendant seeks access to information regarding a different case, such as grand jury testimony about another crime to establish someone else's guilt, access may be denied without a specific showing of relevance.[60] Establishing the relevance of one piece of evidence may be dependent on access to another, providing at least an argument for discovery of the latter. [61] Relevance disputes often arise where the defendant seeks statistical data to prove a claim of racial profiling or selective enforcement;[62] to obtain such information, the defense should file a motion for discovery under Rule 14(a)(2) with an affidavit providing at least some basis to suspect selective or discriminatory enforcement.[63]

*Within "control":* Regarding the Commonwealth's discovery obligations, Rule 14 limits discoverable material to is in the "…possession, custody or control of the prosecutor, persons under the prosecutor's direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecutor's office or have done so in this case."[64] The

[58] Mass. R. Crim. P. 14(a)(1)(A).

[59] Mass. R. Crim. P 14(a)(1)(A). *See, e.g.*, Commonwealth v. Matis, 446 Mass. 632 (2006) (defendant demonstrated that access to crime scene, a private home in which he was accused of rape, was relevant to his defense).

[60] Commonwealth v. Dew, 443 Mass. 620, 627 (2005); Commonwealth v. Clemente, 452 Mass. 295, 311-313 (2008) (prosecution had no duty to disclose to murder defendants the grand jury testimony and DEA interview notes from an unrelated case).

[61] Such information will not be subject to automatic discovery and should be pursued by motion. *Cf.* Commonwealth v. Dew, 443 Mass. 620 (2005). In *Dew,* the defendant wanted to discover evidence relating to a murder that had occurred in the same apartment building where the murder he was accused of committing had taken place. The defendant argued that he could only establish the relevance of the earlier murder by accessing the grand jury transcripts related to that murder. The SJC upheld the denial of discovery because the grand jury testimony had been impounded to protect the ongoing investigation and the defendant could not establish its relevance to his case. *Id.* at 627.

[62] *See e.g.* Commonwealth v. Bernardo B. 453 Mass.
158 (2009); Commonwealth v. Betances 451 Mass. 457 (2008); Commonwealth v. Thomas, 451 Mass. 451 (2008).

[63] Commonwealth v. Betances, 451 Mass. 457 (2008);

[64] Mass. R. Crim. P. 14(a)(1)(A). The language in the rule is derived from Commonwealth v. Daye, 411 Mass. 719, 734 (1992)(prosecutor "cannot be said to suppress that which is not in his possession or subject to his control"). *See also* Commonwealth v. Murray, 461 Mass. 10, 19 (2011); Commonwealth v. Williams, 456 Mass. 857, 870 (2010); Commonwealth v. Caillot 454 Mass. 245 (2009); Commonwealth v. Clemente, 452 Mass. 295, 311 (2008); Commonwealth v. Thomas, 451 Mass. 451 (2008); Commonwealth v. Laguer, 448 Mass. 585, 591 n. 21 (2007); Commonwealth v. Sleeper, 435 Mass. 581, 605 (2002); Commonwealth v. Martin, 427 Mass. 816, 823-24 (1998); Commonwealth v. Tucceri, 412 Mass. 401, 407 (1992); Commonwealth v. Gilday, 382 Mass. 166, 174 (1980); Commonwealth v. Mathews, 10 Mass. App. Ct. 888 (1980); Commonwealth v. Neal, 392 Mass. 1, 7–8 (1984); Commonwealth v. Pisa, 372 Mass. 590, 596–97 (1977).

cooperating officials are usually police, but they include others assisting in the prosecution, such as victim-witness advocates working with the prosecution, or the Commonwealth crime lab.[65]

Items that are no longer in the custody of police because they have been returned to their owners are generally considered to be in the custody and control of the prosecution if the police worked on the investigation and gave the items back to the owner.[66] Where there is a high degree of cooperation between state prosecutors, federal prosecutors and the FBI, information within the possession of the FBI may be imputable to the state.[67] The burden is on the Commonwealth to retrieve the information from federal authorities.

The term "prosecution team" has been held to *exclude* the following*:*

- **Complainants and victims** are not agents of the prosecution and information in their possession is not considered under the control of the prosecution team.[68]

- Information known to **an independent witness,** but unknown to the prosecution, is not within the possession and control of the prosecution, unless that witness has acted in some capacity as an agent of the government in the investigation and prosecution of the crime.[69] This includes statements made by the defendant in the possession of an independent third party who did not turn them over to the prosecution.[70]

- **Law enforcement officials and agencies** not involved in the case are not part of the prosecution team. For instance, arrest records and statistics in the custody of a State Police colonel and the RMV, but not in the control of the state trooper who arrested the defendant, were not "information held by agents of the prosecution team."[71]

- Relevant evidence in the possession of **hospital staff** without ever reaching police or prosecution custody is not imputable to the prosecution without a showing that the hospital staff participated in the investigation or evaluation of the case, nor is the hospital's failure to preserve the evidence.[72] However, the district attorney is responsible to insure that rape kits are preserved.[73]

---

[65] Commonwealth v. Martin, 427 Mass. 816, 823-24 (1998)(reversing conviction because the prosecutor failed to turn over evidence he did not know existed, but which was known to the Commonwealth crime lab, finding a duty of inquiry because the chemist was "sufficiently subject to the prosecutor's control); Commonwealth v. Frith, 458 Mass. 434 (2010); Commonwealth v. Gallarelli, 399 Mass. 17, 20 n. 4 (1987).

[66] Commonwealth v. Clemente, 452 Mass. 295, 309 (2008).

[67] Commonwealth v. Lykus, 451 Mass. 310, 326 (2008). *See also* Commonwealth v. Liebman, 379 Mass 671, 675 (in dual sovereign situations, where specific motion for exculpatory evidence allowed, burden of securing federal cooperation on state prosecutor). In Commonwealth v. Donahue, 396 Mass. 590, 599, 602 a state conviction was reversed because "on the defendant's specific request for exculpatory materials in the possession of the F.B.I., the prosecutor was obliged either to seek the cooperation of the appropriate Federal authorities or, if he had a good faith reason for refusing to do so, to inform the defendant of that refusal." The SJC announced that "the following factors are important in determining whether the prosecutor is obligated to seek requested exculpatory evidence from Federal authorities: the potential unfairness to the defendant; the defendant's lack of access to the evidence; the burden on the prosecutor of obtaining the evidence; and the degree of cooperation between State and Federal authorities, both in general and in the particular case."

[68] Commonwealth v. Beal, 429 Mass. 530 (1999).

[69] Commonwealth v. Beal, 429 Mass. 530 (1999); Commonwealth v. Ira I., 439 Mass. 805 (2003). Where a third party witness is in possession of evidence that will be admitted at trial, but the evidence is not in the custody or control of the Commonwealth until the witness provides it, and the witness is not easily available to the Commonwealth, the Commonwealth has not violated its disclosure obligations so long as it provides the evidence when it is received. Commonwealth v. Williams, 456 Mass. 857 (2010).

[70] Commonwealth v. Ira I., 439 Mass. 805 (2003).

[71] Commonwealth v. Thomas, 451 Mass. 451, 454-455 (2008)(citing Commonwealth v. Beal,429 Mass. 530 (1999)).

[72] Commonwealth v. Lucien, 440 Mass. 658, 662-663 (2004); Commonwealth v. Storella, 6 Mass. App. Ct. 310 (1978) (discussion regarding when hospital staff is and is not agent of police).

- An expert whose only role is to examine evidence and testify as an **expert witness**, rather than assist in the preparation of the case, is not a member of the prosecution team.[74]

- Records of the Police Department's **Internal Affairs Division** (IAD) have been held not to be in the control of the prosecution team.[75]

*Prosecutorial duty to inquire:* The prosecutor has a *"duty of reasonable inquiry"* regarding the existence of discoverable materials that may be in the possession of persons under the prosecutor's "direction and control" or persons who have reported to the prosecutor in the particular case.[76] If the prosecutor is unaware of certain discoverable information, but it is in the possession of the prosecution team, the failure to turn over such information will be imputed to the Commonwealth.[77] Only after inquiring with others who have worked on the case can the prosecutor make a true and accurate representation on the certificate of compliance.[78]

The prosecutor's duty of inquiry is limited to ascertaining and delivering material it and its investigative or cooperating agents *already* possess or control; there is no general prosecutorial duty to search for evidence that may be held by person's beyond the prosecutor's team.[79] On the other hand, "prosecutors are bound by an ethical duty not to...intentionally [avoid] information that may be

---

[73] In Commonwealth v. Wilder, 18 Mass. App. Ct. 782, 783–85 (1984), the court found that the Commonwealth's obligation to disclose exculpatory evidence did not reach a rape kit destroyed by a hospital or clothing kept by the victim because they were never in the possession or control of the Commonwealth. However, the case did ask district attorneys to establish procedures whereby the contents of the rape evidence kits are preserved by hospitals, so failure to do so the next time might be more reasonably attributable to the Commonwealth.

[74] Commonwealth v. Sleeper, 435 Mass. 581, 604-606 (2002). In *Sleeper*, the Commonwealth failed to disclose that the expert psychiatric witness who examined the defendant and gave opinion evidence had been sued by others for sexual misconduct; the court upheld the trial court's finding that the expert witness was not a member of the "prosecutor's team" who was required to disclose such information about himself.

[75] Commonwealth v. Wanis, 426 Mass. 629 (1998). Although ordinarily only reachable by subpoena, the SJC noted that (even if held by the IAD or other unrelated law enforcement agencies) the Constitution requires that exculpatory evidence be provided the defendant, and that "no special showing of relevance or need is required for the production of statements of percipient witnesses" in the possession of such an agency.

[76] Commonwealth v. Frith, 458 Mass. 434, 440 (2010), citing Commonwealth v. Martin, 427 Mass. 816, 823 (1998). *See also* Kyles v. Whitley, 514 US 419 (1995)(prosecutor has duty to learn of exculpatory evidence regardless of any failure by the policy to bring favorable evidence to the prosecutor's attention); Com. v. Baldwin, 385 Mass. 165, 177 n. 12 (evidence in the possession of police is Brady material even if prosecutor is unaware of it)

[77] Commonwealth v. Frith, 458 Mass. 434 (2010); Commonwealth v. Laguer, 448 Mass. 585, 591 fn. 21, 593 (2008) (information in possession of detective who worked on investigation not sent to prosecutor, imputed to the Commonwealth). Obviously, information that could not be known to the prosecution because it did not exist at the time of trial cannot be said to be in the custody or control of the prosecution. Commonwealth v. McGowen, 458 Mass. 461 (2010) (report on administrative problems in state DNA lab was not released until after trial); Commonwealth v. Clemente, 452 Mass. 295 (2008) (grand jury testimony of witness did not occur until after trial).

[78] Commonwealth v. Frith, 458 Mass. 434, 440 (2010). "A prosecutor's belief that no inquiry is necessary or required in the circumstances of a particular case, based only on the prosecutor's assumption that all of the items and information subject to discovery have been turned over, does not comport with Rule 14 …[T]he prosecutor plainly knew that he did not make a "reasonable inquiry" as to any outstanding discovery, even if he were operating under a misapprehension that he already was in possession of the relevant police reports....By signing the certificate of compliance, which stated that the Commonwealth had made reasonable inquiry, the ADA made a false representation to the court. …" *Id.* at 440=441. *See also* Mass. R. Crim. P. 14(a)(3).

[79] The SJC's Standing Advisory Committee on the Criminal Rules considered the issue in 1996 and concluded that "there is no duty on the prosecutor to investigate specifically for exculpatory evidence," nor should there be. 11/5/96 memo, on file with author.

exculpatory" in their interviews with complainants, even though this would put the information in the Commonwealth's possession and therefore make it subject to discovery."[80]

## 16.3B. PRESERVING ITEMS IN NON-PARTY HANDS

Rule 14 cannot be used to obtain pretrial access to records in the hands of third parties who are not part of the prosecution team. Rather, they can only be obtained by means of a judicial order authorizing the issuance of a Rule 17(a)(2) summons.[81] Nevertheless, the prosecution does have an obligation regarding such evidence under Rule 14(a)(1)(E): if the prosecution becomes aware of the existence of evidence in third party hands that would be subject to mandatory discovery were it within the Commonwealth's custody or control, *it must notify the defendant* of the existence (and if known, the location) of the item.

The defendant may then move for an order requiring the individual or entity in possession of the item to preserve it for a specified period of time.[82] (Note that Rule 7(d) additionally requires the court to ensure that at or before arraignment the parties are provided an opportunity to move for preservation of evidence.) To provide a party or independent witness with recourse when a preservation order is inappropriate or unnecessary, the provision provides for motions to vacate or modify the preservation order, or to protect the probative value of the evidence by alternative means.

Case law also states that the district attorney is responsible for insuring that rape kits are preserved.[83]

*Dwyer's* detailed protocol for summonsing records and other items in third party hands is addressed in the next section.

## 16.3C. SUMMONSING THIRD PARTY RECORDS; POTENTIALLY PRIVILEGED RECORDS

Abrogating earlier precedent, the Supreme Judicial Court held in 2006 that "pretrial access to the records of third parties can be obtained *only* on a judicial order authorizing the issuance of a Rule 17(a)(2) summons."[84] Rule 17(a)(2) allows the court to summons "books, papers, documents, or other objects" held by non-parties; and it permits the summons to compel production "within a reasonable time" prior to trial, thereby avoiding delays during trial and also allowing counsel time to consider its implications and use. This provision also licenses the court, on motion, to "quash or modify the summons if compliance would be unreasonable or oppressive or if the summons is being used to subvert the provisions of rule 14." However, the spare terms of Rule 17(a)(2) must be construed in conjunction with the 2006 case *Commonwealth v. Dwyer*,[85] in which the Supreme Judicial Court

[80] Commonwealth v. Beal, 429 Mass. 530, 535 n. 4 (1999). *See also* Commonwealth v. Richardson, 49 Mass. App. Ct. 82 (2000)(prosecution not responsible for victim's destruction of evidence).

[81] Commonwealth v. Dwyer, 448 Mass. 122, 140 n. 22 (2006).

[82] Mass. R. Crim. P. 14(a)(1)(E)(ii). (Any party that successfully moves for such a preservation order should insure that the order is served on the individual or entity that possesses the item.

[83] In Commonwealth v. Wilder, 18 Mass. App. Ct. 782, 783–85 (1984), the court found that the Commonwealth's obligation to disclose exculpatory evidence did not reach a rape kit destroyed by a hospital or clothing kept by the victim because they were never in the possession or control of the Commonwealth. However, the case did ask district attorneys to establish procedures whereby the contents of the rape evidence kits are preserved by hospitals.

[84] Commonwealth v. Dwyer, 448 Mass. 122, 140 n. 22 (2006). The earlier case, In re Jansen, 444 Mass. 112 (2005), had suggested that Rule 14(a)(2) could be used for third party discovery.

[85] 448 Mass. 122 (2006).

announced a new protocol for third party summons, along with a series of form motions and orders now appended to Mass. R. Crim. P. 17. *Dwyer's* procedures are based on new ground ploughed by the SJC both in the case before it and in the earlier *Commonwealth v. Lampron.*[86]

*Dwyer* primarily concerned a defendant's pretrial access to allegedly privileged records of third-party witnesses, including but not limited to rape counseling records.[87] In the process, however, Dwyer prescribed procedures for the broad instance of summonsing third party records generally. Counsel seeking access to third-party records now must follow the *Dwyer* protocol (unless the case predated *Dwyer*.[88]) It is quite detailed and must be followed precisely, on peril of sanctions and/or disciplinary proceedings. Therefore, the complete procedure is reproduced from the case verbatim here, in the margin.[89] To provide an initial but merely cursory understanding, the following summarizes some key aspects of the protocol:

---

[86] 441 Mass. 265 (2004).

[87] Commonwealth v. Dwyer, 448 Mass. 122, 139-47 (2006) ("The amended protocol is designed to give the fullest possible effect to legislatively enacted privileges consistent with a defendant's right to a fair trial …").

[88] The new procedures are not constitutionally compelled and as a result they only apply prospectively. Commonwealth v. Dwyer, 448 Mass. 122, 124 (2006).

[89] Commonwealth v. Dwyer, 448 Mass. 122, *Appendix* (2006), mandates the following procedures:

(1) *Filing and service of a motion pursuant to Mass. R. Crim. P. 17(a)(2), 378 Mass. 885 (1979).*

(a) Whenever in a criminal case a defendant seeks to summons "books, papers, documents, or other objects" (records) from any nonparty individual or entity prior to trial, the defendant shall file a motion pursuant to Mass R. Crim. P. 17(a)(2), stating the name and address of the custodian of the records (record holder); the name, if any, of the person who is the subject of the records (third-party subject), for example a complainant; and describing, as precisely as possible, the records sought. The motion shall be accompanied by an affidavit as required by Mass. R. Crim. P. 13(a)(2), as appearing in 442 Mass. 1516 (2004), and *Commonwealth v. Lampron,* 441 Mass. 265, 806 N.E.2d 72 (2004) ( *Lampron* ).

(b) The defendant should serve the motion and affidavit on all parties.

(c) The Commonwealth shall forward copies of the motion and affidavit to the record holder and (where applicable) to the third-party subject, and notify them of the date and place of the hearing on the motion. See *Lampron, supra* at 270-271, 806 N.E.2d 72. The Commonwealth shall also inform the record holder and third-party subject that (i) the *Lampron* hearing shall proceed even if either is absent; (ii) the hearing shall be the third-party subject's only opportunity to address the court; (iii) any statutory privilege applicable to the records sought shall remain in effect unless and until the third-party subject affirmatively waives any such privilege, and that failure to attend the hearing shall not constitute a waiver of any such privilege; and (iv) if the third-party subject is the victim in the case, he or she has the opportunity to confer with the prosecutor prior to the hearing. See G.L. c. 258B, § 3( *g*).

(2) *The Lampron hearing and findings.*

(a) At the *Lampron* hearing, the judge shall hear from all parties, the record holder, and the third-party subject if present.[89] They should be heard on whether the records are relevant or statutorily privileged.

(b) Following the *Lampron* hearing, the judge shall make oral or written findings with respect to the records sought from each record holder: (1) that the defendant seeking the records has or has not satisfied the requirements of rule 17(a)(2), as explicated in *Lampron, supra* at 269, 806 N.E.2d 72, and *Commonwealth v. Dwyer,* 448 Mass. 122, 139-146, 859 N.E.2d 400 (2006); and (2) that the records sought are or are not presumptively privileged. Presumptively privileged records are those prepared in circumstances suggesting that some or all of the records sought are likely protected by a statutory privilege, for example, a record prepared by one who holds himself or herself out as a psychotherapist, see G.L. c. 233, § 20B; a social worker, see G.L. c. 112, § 135B; a sexual assault counselor, see G.L. c. 233, § 20J; or a domestic violence victims' counselor, see G.L. c. 233, § 20K. A judge's determination that any records sought are presumptively privileged shall not be appealable as an interlocutory matter, and shall carry no weight in any subsequent challenge that a record is in fact not privileged.

(3) *Summons and notice to record holder.* If all Rule 17(a)(2) requirements have been met and there has been no finding that the records sought are presumptively privileged, the judge shall order a summons to issue directing the record holder to produce the records. The records should be maintained separately from the court file and should not be made available for public inspection until such a record is introduced into evidence at trial.[89] If the records have been found to be presumptively privileged the judge should inform the record holder to produce the records in a sealed envelope marked privileged, and the records shall not be available for inspection except by counsel as explained below.

Where a judge has determined that some or all of the requested records are presumptively privileged, the summons shall so inform the record holder, and shall order the record holder to produce such records to the clerk of the court in a sealed envelope or box marked "PRIVILEGED," with the name of the record holder, the case name and docket number, and the return date specified on the summons. The clerk shall maintain the records in a location separate from the court file, clearly designated "presumptively privileged records," and the records shall not be available for inspection except by counsel as provided in paragraph 4(b), *infra.* The records shall not be made available for public inspection unless and until any record is introduced in evidence at trial.

(4) *Inspection of records.*

(a) *Nonpresumptively privileged records.* The clerk of court shall permit defense counsel who obtained the summons to inspect and copy all records that are not presumptively privileged. The Commonwealth's ability to inspect or copy the records is within a judge's discretion. Cf. Commonwealth v. Mitchell, 444 Mass. 786, 800, 831 N.E.2d 890 (2005) (also noting that defendant may have production obligations pursuant to Mass. R. Crim. P. 14, as appearing in 442 Mass. 1518 [2004], or other pretrial agreements).

(b) *Presumptively privileged records.* The clerk of court shall permit only defense counsel who obtained the summons to inspect the records, and only on counsel's signing and filing a protective order in a form approved by this court. The protective order shall provide that any violation of its terms and conditions shall be reported to the Board of Bar Overseers by anyone aware of such violation.

(5) *Challenge to privilege designation.* If, on inspection of the records, defense counsel believes that any record or portions thereof is in fact not privileged, then in lieu of or in addition to a motion to disclose or introduce at trial, see paragraphs 6 and 7, *infra,* counsel may file a motion to release specified records or portions thereof from the terms of the protective order. Counsel shall provide notice of the motion to all parties. Prior to the hearing, counsel for the Commonwealth shall be permitted to review such records in order to respond to the motion, subject to signing and filing a protective order as provided in paragraph 4(b) of Appendix. If a judge determines that any record or portion thereof is not privileged, the records shall be released from the terms of the protective order and may be inspected and copied as provided in paragraph 4(a) of Appendix.

(6) *Disclosure of presumptively privileged records.*

(a) If defense counsel who obtained the summons believes that the copying or disclosure of some or all of any presumptively privileged record to other persons (for example, the defendant, an investigator, an expert) is necessary to prepare the case for trial, counsel shall file a motion to modify the protective order to permit copying or disclosure to specifically named individuals of particular records. The motion shall be accompanied by an affidavit explaining with specificity the reason why copying or disclosure is necessary; the motion and the affidavit shall not disclose the content of any presumptively privileged record. Counsel shall provide notice of the motion to all parties.

(b) Following a hearing, and in camera inspection of the records by the judge where necessary, a judge may allow the motion only on making oral or written findings that the copying or disclosure is necessary for the defendant to prepare adequately for trial. The judge shall consider alternatives to full disclosure, including agreed to stipulations or disclosure of redacted portions of the records. Before disclosure is made to any person specifically authorized by the judge, that person shall sign a copy of the court order authorizing disclosure. This court order shall clearly state that a violation of its terms shall be punishable as criminal contempt.

(c) All copies of any documents covered by a protective order shall be returned to the court on resolution of the case, i.e., on a change of plea or at the conclusion of any direct appeal following a trial or dismissal of the case.

(7) Use of presumptively privileged documents at trial.

*Regarding a 17(a)(2) summons to third parties for documents or objects:*

Before any summons may issue, the court must hold a "Lampron hearing," at which the judge is to make oral or written findings whether (1) that the defendant seeking the records has or has not satisfied the requirements set out in the rule, as construed by *Lampron* and *Dwyer*, and (2) whether the records sought are presumptively privileged.

The *Dwyer* protocol mandates that under Rule 17(a)(2), the party moving to subpoena documents before trial must establish good cause, satisfied by a showing (1) that the documents are evidentiary and relevant;[90] (2) that they are not otherwise procurable reasonably in advance of trial by an exercise of diligence;[91] (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial;[92] and (4) that the application is made in good faith and is not intended as a general "fishing expedition."[93] The record holder and any person who is a subject of the records must be given notice and an opportunity to be heard on whether the records sought are relevant or covered by a statutory privilege.[94] The Commonwealth has standing to challenge issuance of the summons.[95]

Before a summons may issue, the judge must also find whether the records are presumptively privileged -- i.e. "prepared by a person in circumstances suggesting that the records are likely protected by a statutory privilege."[96] The record-holder and the third party subject of the records, if any, must be afforded notice and an opportunity to be heard on whether the records sought are relevant or covered by a statutory privilege.[97] Unless the record holder explicitly waives the privilege, all records likely to be

---

(a) A defendant seeking to introduce at trial some or all of any presumptively privileged record shall file a motion in limine at or before any final pretrial conference.

(b) Counsel for the Commonwealth shall be permitted to review enough of the presumptively privileged records to be able adequately to respond to the motion in limine, subject to signing and filing a protective order as provided in paragraph 4(b) of Appendix.

(c) The judge may allow the motion only on making oral or written findings that introduction at trial of a presumptively privileged record is necessary for the moving defendant to obtain a fair trial. Before permitting the introduction in evidence of such records, the judge shall consider alternatives to introduction, including an agreed to stipulation or introduction of redacted portions of the records.

(8) *Preservation of records for appeal.* Records produced in response to a rule 17(a)(2) summons shall be retained by the clerk of court until the conclusion of any direct appeal following a trial or dismissal of a case.

[90] Commonwealth v. Lampron, 441 Mass. 265, 269 (2004). Potential relevancy and conclusory statements regarding relevance are insufficient. *Id.*

[91] To meet this second requirement of Rule 17(a)(2), the moving party must show that the documents sought are not otherwise procurable reasonably in advance of trial by exercise of due diligence. This imposes the affirmative obligation on the moving party to show that no other source likely exists for the desired records. Commonwealth v. Dwyer, 448 Mass. 122, 147 (2006).

[92] This requirement "is designed to limit the use of Rule 17(a)(2) to instances where the absence of pretrial production would tend unreasonably to delay the trial." *Id*. at 147.

[93] This requirement is a reminder that "Rule 17(a)(2) is not a discovery tool, and that the limited purpose of Rule 17(a)(2) is to authorize a court to expedite the trial by providing a time and place before trial for the inspection of the subpoenaed materials." *Id.* at 147.

[94] Dwyer, supra, at 418-19

[95] Commonwealth v. Lam, 444 Mass. 224, 229 (2005).

[96] Commonwealth v. Dwyer, 448 Mass. 122, 143 n. 25 (2006). *See also* G.L. c. 233, §20B (psychotherapist); G.L. c. 233, § 135B (social worker); G.L. c. 233 § 20J (sexual assault counselor); G.L. c. 233 § 20K (domestic violence victim's counselor).

[97] Dwyer, *supra*, at 145.

covered by a statutory privilege shall be treated as presumptively privileged.[98] At this stage, the judge need not determine that the summonsed records are in fact privileged.[99]

*If the records are presumptively privileged:*

The defendant is entitled to material, exculpatory evidence even if it is subject to a state privilege. The privilege must yield to the defendant's constitutional rights to exculpatory evidence under the due process clause and to confront witnesses under the Sixth Amendment and article 12.[100] If the records sought are presumptively privileged, the *Dwyer* protocol mandates further requirements. They replace the prior "Bishop-Fuller" protocols, which had left pretrial inspection of statutorily privileged material to be conducted by the trial judge *in camera*. Finding that the judge is not in a position to assess the exculpatory significance of the material,[101] *Dwyer* held that inspection of presumptively privileged third party records for exculpatory evidence is to be conducted by defense counsel, not the judge.[102] Under the *Dwyer* protocol:

- If a judge orders the issuance of a Rule 17(a)(2) summons, all presumptively privileged records received must be retained in court under seal, and may only be inspected by the defense attorney who summonsed the records.[103]

- Before inspecting any record, defense counsel must sign and file a protective order containing strict non-disclosure provisions which prohibit counsel from copying or disclosing its contents to anyone, including the defendant. Judges must report any violation to the Board of Bar Overseers for disciplinary action.

- After inspection, the defense may challenge the privilege designation by filing a motion to modify the protective order, which triggers a prosecution right to inspect the records subject to executing a protective order.[104]

- Any subsequent disclosure to the defendant or any other person may be permitted only by the court upon a motion for "specific, need-based written modification of the protective order."[105]

---

[98] Dwyer, *supra,* at 145-146.

[99] Id.

[100] Dwyer, *supra*, at 143 (allowing defendant to pierce a statutory privilege may be required by the constitutional right to "put before a jury evidence that might influence the determination of guilt," quoting Pennsylvania v. Ritchie, 480 U.S. 39 (1987); Commonwealth v. Sheehan, 435 Mass. 183 (2001)(reversed because denial of psychiatric records deprived defendant of right to present a defense); Commonwealth v. Figueroa, 413 Mass. 193, 201 (1992) (citing Commonwealth v. Stockhammer, 409 Mass. 867, 883 (1991)); Commonwealth v. Clancy, 402 Mass. 664, 670 (1988); Commonwealth v. Two Juveniles, 397 Mass. 261, 266 (1986) (confrontation clauses).

[101] The S.J.C. noted in *Dwyer* that *"*requiring judges to take on the perspective of an advocate is contrary to the judge's proper role as a neutral arbiter," and that "[t]he absence of an advocate's eye may have resulted in overproduction, as well as underproduction, of privileged records, and has repeatedly contributed to trial delays and appeals, jeopardizing the rights of defendants, complainants, and the public." *Id*. at 144.

[102] Commonwealth v. Dwyer, 448 Mass. 122 (2006).

[103] Dwyer, *supra,* at 146.

[104] Dwyer, supra, at 149-50. In ruling on such a challenge, the judge must look behind the mere assertion of a privilege, and specify which privilege(s) she finds actually apply to protect specified documents or categories of documents. Commonwealth v. Pare, 427 Mass. 427, 429–30 (1998) (bare "findings" that various specific privileges had been "asserted" did not satisfy first requirement of *Bishop* protocol). For example, a rape crisis center's records showing the time, date, and fact of communication between the complainant and the rape counselor is not protected under the sexual assault counselor privilege. Commonwealth v. Neumyer, 432 Mass. 23 (2000).

[105] *Id.* A violation of the court order is punishable by criminal contempt. *Id.*

- To use a presumptively privileged document at trial, the defendant must file a motion in limine, which may be allowed by the court only after consideration of alternatives (such as redaction or stipulation) and upon a finding that its use is necessary to provide a fair trial.[106]

Although written prior to Dwyer, the following strategies suggested by CPCS for challenging a privilege designation are worth considering:[107] *First*, consider whether the communication fits the contours of the privilege,[108] and whether the privilege may have been waived, *e.g.,* by revelation of the privileged communication to anyone outside the privilege (police, DAs, family members, etc.)."[109] *Second*, file a motion for leave to show relevance *ex parte* and to impound that submission, so as to avoid prosecution discovery of defense theories.[110] This motion should cite the defendant's attorney-client privilege, his right to the effective assistance of counsel, his privilege against self-incrimination, his right to due process of law and a fair trial, and the right to protect defense counsel's work product. *Third*, consider a broad range of theories of relevance, such as bias and motive to lie, ability to perceive, recollect, and report, prior false allegations, and prior inconsistent statements.[111] *Fourth*, attach the police report to the submission. *Fifth*, renew the motion to compel production "early and often, right up to the filing of your final motion for required finding of not guilty."

---

[106] Dwyer, *supra*, at 422-23.

[107] This paragraph draws upon CPCS Training Unit Memorandum, August 18, 1993.

[108] "The privilege does not protect the existence of the fact of a hospital admission, the dates of hospitalization or even the purpose of the admission, if such purpose does not implicate communications between the witnesses and the psychotherapist, though conceivably such purpose may require disclosure of the diagnosis, and in that instance the purpose is within the privilege." Commonwealth v. Clancy, 402 Mass. 664, 667 (1988). Also, the S.J.C. has held that privileges are to be narrowly construed. *See* Commonwealth v. Pare, 43 Mass. App. Ct. 566, 571 (1997), aff'd 427 Mass. 427 (1998)("The *Bishop* protocols have not altered the traditional recognition that testimonial privileges, which have the effect of inhibiting full disclosure of the truth, are exceptional and to be strictly construed."); Three Juveniles v. Commonwealth, 390 Mass. 357, 359 (1983). *See also* Commonwealth v. Wojcik, 43 Mass. App. Ct. 595, 607–09 (1997) (social worker–client privilege not applicable to mere "preliminary history" in records of counseling sought by defendant in course of perpetrating insurance fraud; statements "were not made in connection with diagnosis and treatment but were false and were part of the continuing scheme to defraud the insurance company." *Wojcik, supra,* 43 Mass. App. Ct. at 608. Defense counsel may cite *Wojcik* to oppose a prosecution witness's claim of privilege if counselor consulted "for any purpose other than, or in addition to, treatment and diagnosis." Carol Donovan, "Recent Developments in the Law Governing Discovery of Privileged Records," *CPCS Training Conference Materials* at 16 (Nov. 14, 1997). *See also* Bernard v. Commonwealth, 424 Mass. 32 (1996) (social worker privilege applies not only to licensed social workers, but also to unlicensed governmental employees, here a state trooper/counselor, practicing social work within the scope of their employment).

[109] CPCS Training Unit Memorandum, August 18, 1993. *See* Commonwealth v. Fitzgerald, 412 Mass. 516, 525 (1992); Proposed Mass. R. Evid. 510 (July 1980) (holder of privilege "waives the privilege, if he voluntarily discloses or consents to disclosure of any significant part of the privileged matter" unless the disclosure itself is privileged).

[110] In Pare v. Commonwealth, 420 Mass. 216 (1995), the S.J.C. held that the submission may not be made ex parte. Arguably, *Pare* violates the defendant's federal constitutional right to due process under *Pennsylvania v. Ritchie. See* Donovan, *Discovery Dilemmas Following* Commonwealth v. Bishop: *The Need for a Rule of Criminal Procedure Governing Discovery of Privileged Records*, MASS. L. REV. 94, 105 (Sept. 1995).

[111] *See* Commonwealth v. Pare, 427 Mass. 427, 431–32 (1998) (information in wrongfully withheld counseling records found relevant to defense decision whether to retain and present expert witness on suggestive interviewing techniques, to allow cross-examination on neutrality, fairness, and reliability of counselor's evaluation of alleged victim, and to raise doubts about latter's credibility, the core issue in case), affirming Commonwealth v. Pare, 43 Mass. App. Ct. 566, 572–73 (1997). Relevancy rulings "are not abstract propositions but are case- and fact-specific." *Pare, supra*, 43 Mass. App. Ct. at 573.

Work product is not discoverable. Rule 14(a)(5) defines "work product" as limited to portions of documents containing only the "legal research, opinions, theories or conclusions of the adverse party or his attorney and legal staff," or statements of the defendant made to his counsel or counsel's legal staff.[112]

Under this definition, documents that reveal the mental processes of counsel or a defense investigator are protected,[113] but (unlike the federal work product doctrine[114]) witness statements obtained by counsel or investigators are generally excluded from work product protection.[115] In some cases, however, witness statements may be so commingled with counsel's theories, or so revealing of counsel's mental processes by virtue of the areas covered, as to be unsegregable and constitute work product even under the Commonwealth's restrictive definition.[116] The U.S. Supreme Court has "stressed the danger that compelled disclosure of such memoranda [investigator's reports based on the statements of witnesses] would reveal the attorney's mental processes."[117]

It should also be noted that work-product protection can be waived if a witness makes "testimonial use" of otherwise protected notes. For example, a defense investigator who refers to his report on the stand may be required to produce it.[118] Additionally, the court has stated that work

[112] Mass. R. Crim. P. 14(a)(5).

[113] For example, victim advocate's notes are protected work product, except insofar as they contain exculpatory evidence or witness statements. Commonwealth v. Bing Sial Liang, 434 Mass. 131, 137–140 (2001).

[114] The Massachusetts work-product protection is narrower in order to promote liberal discovery. Commonwealth v Durham, 446 Mass. 212, 221-22 (2006), citing Commonwealth v. Paszko, 391 Mass. 164, 188 (1984).

[115] *See, e.g.,* Commonwealth v. Durham, 446 Mass. 212, 221-22 (2006); Commonwealth v. Bing Sial Liang, 434 Mass. 131, 140 (2001)(unless victim-witness advocates notes contain statements of witnesses or exculpatory evidence their notes are protected as work product); In re Grand Jury Investigation, 437 Mass. 340, 355 (2002) (investigative activities of school regarding §51A disclosure requirements not subject to work-product protections); Commonwealth v. Paszko, 391 Mass. 164, 186–88 & n.27 (1984) (investigator's report of witness interview and expert's ballistics report discoverable from defendant if they will testify).

The federal definition of "work product" would include witness statements. *See* Fed. R. Crim. P. 16(b)(2); United States v. Nobles, 422 U.S. 225, 238–40 (1975) (work product waived when investigator testified); Commonwealth v. Durham, 446 Mass. 212, 222 (2006) (broad work product protection of federal rule 16 rejected in Massachusetts in favor of liberal discovery).

[116] Commonwealth v. Lewinski, 367 Mass. 889, 902 (1975) (commingling of witness statement with work product of prosecutor might justify denial of document, or at least part of it). *Compare* Commonwealth v Durham, 446 Mass. 212 (2006)(declining to extend work-product protection to witness statements that "seem" to reveal the mental processes of the defense by virtue of the areas covered). *See also* Upjohn v. United States, 449 U.S. 383, 400–01 (1981) (work product protects against attorney interview notes which reveal attorney's mental processes); Goldberg v. United States, 425 U.S. 94 (1976) (interpreting Jencks Act, work product doctrine does not prevent production of notes taken by government lawyers which were approved by the witness, and statements could fairly be said to be the witness's own, not the attorney's mental processes); Commonwealth v. Bing Sial Liang, 434 Mass. 131, 138-140 (2001)(extending protection of notes of victim advocates, including notes from interviews with complaining witnesses, where material is inextricably commingled with advocate's work product); Commonwealth v. Borans, 379 Mass. 117, 153, 152 (1979) (upholding denial of notes of prosecutor, not adopted by witness, which prosecutor claimed was work product).

[117] Upjohn v. United States, 449 U.S. 383, 400 (1981), *citing* Hickman v. Taylor, 329 U.S. 495 (1947).

[118] United States v. Nobles, 422 U.S. 225, 239 (1975). However, no waiver occurs from nontestimonial use, such as "use throughout the trial of the notes, documents, and other internal materials prepared to present adequately his client's case" or reliance on the statement in examination of the witness. *Nobles, supra,* 422 U.S. at 239 n.14. *Compare* Commonwealth v. O'Brien, 419 Mass. 470, 477 ff. (1995) (privilege waived by use of document to refresh recollection of witness).

product may be discoverable if a substantial need for it is shown, and no alternative means of acquiring it exists.[119]

*Discovery of defense files:* When Rule 14 is applied to discover defense counsel's documents, the Sixth Amendment may also be implicated.[120] The Supreme Judicial Court has stated that the work-product doctrine is solely based on public policy, not the constitutional right to counsel, so that a state may choose to preserve only the "core" of the doctrine.[121] Although the Supreme Court has never held the work-product doctrine a component of the Sixth Amendment right to counsel,[122] it has found its "role in assuring the proper functioning of the criminal justice system is even more vital [than in civil cases]. The interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case."[123] And the Sixth Amendment permits "no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary fact-finding process."[124] Therefore, in some cases a Sixth Amendment objection should be asserted even when this state's restrictive work-product doctrine does not apply. In other cases the defendant will find protection in the attorney-client privilege, and in the Fifth Amendment privilege that limits prosecutorial discovery to evidence that the defendant intends to offer at trial.[125]

Rule 14 makes no distinction between the attorney and his legal staff; documents containing either's theories concerning the case should be equally protected. But Professor Amsterdam's *Trial Manual for the Defense of Criminal Cases* suggests that counsel may sometimes prefer to make his own notes based on the investigator's oral report, because attorney records may possibly enjoy greater "work product" protection as a practical matter, especially if commingled with strategic theories.[126]

---

[119] Ward v. Peabody, 380 Mass. 805, 818 (1980).

[120] *Cf.* Commonwealth v. Durham 446 Mass. 212 (2006)(rejecting, on facts of the case, challenges that discovery order requiring defendant to turn over statements of Commonwealth witnesses violated constitutional rights to confrontation, fair trial, effective counsel, and privilege against self-incrimination.

[121] Commonwealth v. Paszko, 391 Mass. 164, 186–88 (1984) Commonwealth v. Bial Sial Liang, 434 Mass. 131 (2001) (rules of criminal procedure preserve the "core" of work-product doctrine). *See also* Commonwealth v. Durham, 446 Mass. 212 (2006)(finding that discovery order requiring that defendant disclose statements of Commonwealth witnesses defense intended to use at trial did not violate defendant's Sixth Amendment right to confrontation).

[122] In United States v. Nobles, 422 U.S. 225, 228, 240 n.15 (1975), the Court found that if there was any Sixth Amendment protection, it was waived when the investigator made testimonial use of his report on the witness stand. Some commentators have suggested that the work-product privilege does find protection in the Sixth Amendment. *See* Allis, *Limitations on Prosecutorial Discovery of the Defense Case in Federal Courts: The Shield of Confidentiality,* 50 S. CAL. L. REV. 461, 507–10 (1977); Pulaski, *Extending the Disclosure Requirements of the Jencks Act to Defendants: Constitutional and Non Constitutional Considerations,* 64 IOWA L. REV. 1, 26–39 (1978).

[123] United States v. Nobles, 422 U.S. 225, 228 (1975).

[124] Herring v. New York, 422 U.S. 853, 857 (1975). *See also* Weatherford v. Bursey, 429 U.S. 545, 553 (1977) (Sixth Amendment questions raised if government can intrude on counsel's trial preparations); Commonwealth v. Miranda, 22 Mass. App. Ct. 10 (1986) (trial court's statement, denying defendant's constitutional right to present closing argument was reversible error).

[125] *See infra* § 16.8A.

[126] AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES, §§ 110, 274(C) (A.L.I.-A.B.A. 3d ed. 1974, 1976).

## 16.3E. DEFINITION OF DISCOVERABLE "STATEMENTS"

"Statements" of various individuals are subject to automatic discovery and appear throughout Rule. 14. Rule 14(d) defines "statement." The definition is in two parts: (d)(1) defines statements which have been written or adopted by the witness herself, and (d)(2) defines statements which are written or recorded versions of a witness' oral statement. The original definition in Rule 14 was revised in 2004, 2008, and 2012, the latter amendment designed to incorporate all statements formerly obtainable under Rule 23, which has been repealed.[127]

*Written statement made or adopted by the witness*: A statement encompassed by subsection (d)(1) is "a writing made, signed, or otherwise adopted by a person having percipient knowledge of relevant facts and which contains such facts, other than drafts or notes that have been incorporated into a subsequent draft or final report." Unlike the prior version of the rule, the witness need not have signed or adopted the statement, on the theory that "prior informal statements, not intended for court, are not only often admissible at trial but often more probative than formal signed statements in anticipation of litigation."[128] Although not explicitly identified in Rule 14's definition, the Supreme Judicial Court has held that a producible statement also includes sketches or diagrams by the witness.[129] Note that this definition does *not* include preliminary drafts or notes that have been incorporated into a subsequent draft or final report; only the latter need be turned over to comply with a discovery obligation to turn over statements – a provision that eliminates the burden of keeping every draft of a police report, for example, but which unfortunately has the potential to bury potentially significant inconsistencies.

*Recording of a witness' oral statement:* The "statement" encompassed by subsection 14(d)(2) is "a written, stenographic, mechanical, electrical, or other recording, or transcription thereof, which is a substantially verbatim recital of an oral declaration, except that a computer assisted real time translation, or its functional equivalent, made to assist a deaf or hearing impaired person, that is not transcribed or permanently saved in electronic form, shall not be considered a statement." Although the 2004 revision had required this to be a contemporaneous record of the witness' statement, that requirement was eliminated in the 2012 amendment. The Reporter's Notes state that this provision "is intended only to require the production of statements that can 'fairly be deemed to reflect fully and without distortion" what the witness said.'"[130]

*Additional obligations:* While the Rule does not generally encompass oral statements that have not been recorded,[131] in some circumstances the prosecutor is obligated to *reduce an oral statement to writing* and furnish it to the defendant. These include: a statement of the defendant or a codefendant;[132]

---

[127] Rule 14(d)'s definition was amended in 2004 to delete the requirement that writings by witnesses be signed or otherwise adopted by the author. The 2008 amendment exempted the contemporaneous but unsaved computer "crawls" used by hearing impaired attorneys. The 2012 amendment added to the definition statements that had previously had been obtainable via repealed Rule 23, which had afforded the defendant a right to relevant statements of a witness prior to cross-examining her, sufficiently in advance to provide time to study the material. The amendment adds to the definition statements "adopted" by the witness, and eliminates the requirement that, when the statement is by another person recording what the witness said, it be contemporaneously recorded.

[128] Reporter's Notes to Mass. R. Crim. P. 14(d).

[129] Commonwealth v. McGann, 20 Mass. App. Ct. 59, 65 (1985).

[130] Reporter's Notes to Rule 14(d), citing Palermo v. United States, 360 U.S. 343, 352-53 (1959) and United States v. Hodges, 556 F.2d 366 (5th Cir. 1977) cert. den. 434 US 1016 (1978) (that investigators' notes contained occasional verbatim recitation of phrases used by the person interviewed did not make such notes discoverable).

[131] Commonwealth v. Spann, 383 Mass. 142, 148–50 (1981) (Commonwealth had no duty to reduce statement of witness to writing absent an agreement to do so).

[132] Mass. R. Crim. P. (a)(1)(a)(i); Commonwealth v. Lewinski, 367 Mass. 889, 903 (1975).

a statement that contradicts an earlier statement by the witness or is otherwise exculpatory;[133] and, possibly, a statement that the prosecutor deliberately failed to reduce to writing so as to avoid discovery.[134]

It is also worth noting that, regardless of 14(d)'s definition, any statement containing prior inconsistent statements may be discoverable under the defendant's constitutional right to exculpatory evidence as soon as the inconsistency becomes known. As the Supreme Judicial Court has stated, in the case of an important witness, "the defense will properly view even relatively minor discrepancies in prior statements as exculpatory."[135] Under a separate but similar analysis, the Commonwealth is obligated to turn over any statement, oral or written, that corrects the witness's prior statement.[136]

## § 16.4 SANCTIONS FOR NON-COMPLIANCE

### 16.4A. CASE-SPECIFIC COURT ORDER GENERALLY NOT NECESSARY

Mass. R. Crim. P. 14(c) authorizes sanctions for noncompliance with discovery obligations "issued or imposed pursuant to this rule." Automatic discovery under 14(a)(1)(A) and (B), although mandated by rule rather than a court-issued order, therefore has the same force and effect as the latter, so violation of its obligations opens the party to all the same sanctions.[137] Similarly, the "special procedures" contained in Rule 14(b) authorize certain sanctions in the absence of a court order, including: exclusion of a defense based on license, claim of authority or ownership, or exemption if the required notice is not given to the prosecutor;[138] and certain sanctions that are permitted if the defendant refuses to submit to a mental examination pursuant to the prosecutorial discovery provisions related to the insanity defense.[139]

---

[133] Commonwealth v. Vaughn, 32 Mass. App. Ct. 435, 439–42 (1992) (reversed); Commonwealth v. Borans, 379 Mass. 117, 153 (1979); Commonwealth v. Gilbert, 377 Mass. 887, 893 (1979). *See also infra* § 16.6.A, regarding exculpatory evidence.

[134] See Commonwealth v. St. Germain, 381 Mass. 256, 261 n.5 (1980). *Cf.* Commonwealth v. Santiago, 30 Mass. App. Ct. 207, 221–22, n.5 (1991) (advising that in taking notes, police officers should at least note exculpatory statements or the fact that none were made); Commonwealth v. Gilbert, 377 Mass. 887, 893 (1979)(the attorney's duty to disclose a witness statement should not turn on his own election whether to reduce it to writing).

[135] Commonwealth v. St. Germain, 381 Mass. 256, 262 (1980). *Accord* Commonwealth v. Vaughn, 32 Mass. App. Ct. 435, 439–42 (1992)(conviction reversed); Commonwealth v. Baldwin, 385 Mass. 165, 174 (1982); Commonwealth v. Scalley, 17 Mass. App. Ct. 224, 228–29 (1983). *See also* In re Roche, 381 Mass. 624, 637 (1980) (prior inconsistent statements would be "highly relevant" to the case).

The constitutional requirements regarding production of exculpatory evidence are addressed *infra* at § 16.6A.

[136] Commonwealth v. Vaughn, 32 Mass. App. Ct. 435, 440 ff. (1992) (prosecutor knew of but did not disclose crucial change in testimony of key Commonwealth witness; conviction reversed); Commonwealth v. Borans, 379 Mass. 117, 153 (1979); Commonwealth v. Gilbert, 377 Mass. 887, 892 (1979). *Compare* Commonwealth v. Richenburg, 401 Mass. 663, 672 (1988) (not a violation of pretrial agreement if witness's testimony differs somewhat from produced written report, particularly if prosecutor did not know testimony would differ before witness took stand); Commonwealth v. McLeod, 394 Mass. 727, 743–44 (1985) (variance does not demonstrate *Brady* violation).

[137] Mass. R. Crim. P. 14 (a)(1)(C) and 14(c)(1).

[138] Mass. R. Crim. P. 14(b)(3).

[139] Mass. R. Crim. P. 14(b)(2)(B)(iv).

Further, a discovery agreement between counsel contained in the pretrial conference report is equivalent to a court order and therefore subject to all of the same sanctions for noncompliance.[140] Sanctions may even be applied for failure to provide discovery based solely on verbal agreements or apparent cooperation.[141] Failure to file a pretrial conference report may itself result in sanctions.[142]

Finally, it is worth noting that when the prosecutor takes improper steps intended to handicap the defense by denying an opportunity for discovery, the Supreme Judicial Court has suggested that dismissal or other remedies may be appropriate.[143]

## 16.4B. TYPES OF REMEDIES AND SANCTIONS

This section addresses the sanctions that are available generally for the *Commonwealth's* noncompliance with discovery requirements. Sanctions or remedies available for suppression or delayed disclosure of *exculpatory evidence* are addressed *infra* at § 16.6A(2); for *lost or destroyed evidence* at § 16.6B; for *defendant's failure* to comply with prosecutorial discovery at § 16.8E; and, regarding failure to give notice of an insanity defense in particular, at § 16.7B(3).

Mass. R. Crim. P. 14 contains several provisions authorizing remedies or sanctions for noncompliance with the discovery rules.[144] Under its omnibus sanctions provision, Rule 14(c), the court

[140] Mass. R. Crim. P. 11(a)(2)(B) and 11(c)(1). "Agreements reduced to writing in the conference report shall be binding on the parties and shall control the subsequent course of the proceeding." Id., 11(a)(2). *See also* Commonwealth v. Gallarelli, 399 Mass. 17, 20 (1987) (new trial ordered because pretrial report's agreement to provide exculpatory evidence violated); Commonwealth v. Mellone, 24 Mass. App. Ct. 275, 283 (1987) (judge would have been justified in excluding testimony where discovery promised in report was not delivered); Commonwealth v. Chappee, 397 Mass. 508, 517 (1986) (upholding exclusion of defendant's evidence for violation of agreement), *habeas denied sub nom.* Chappee v. Vose, 843 F.2d 25 (1st Cir. 1988); Commonwealth v. Gliniewicz, 398 Mass. 744, 746–49 (1986) (reversed because destruction of evidence violated pretrial agreement to permit defendant to inspect evidence); Commonwealth v. Pope, 19 Mass. App. Ct. 627, 630 n.3 (1985) (no intentional violation); Commonwealth v. Delaney, 11 Mass. App. Ct. 398, 401–405 (1981) (failure to exclude surprise Commonwealth witness was within court's discretion); Commonwealth v. Scalley, 17 Mass. App. Ct. 224, 230–31 & n.8 (1983) (no violation of agreement and no prejudice).

[141] In Commonwealth v. Donahue, 396 Mass. 590, 600–01 (1986), the court found a discovery violation and ordered a new trial. Because the prosecutor seemed to be cooperating, counsel could assume no order was required. "If we were to require a court order in such circumstances, prudent defense counsel would be encouraged to argue all discovery motions, [undermining] the voluntariness on which the smooth functioning of the pretrial discovery rules depends…" *Donahue, supra,* 396 Mass. at 601 n.11 *See also* Commonwealth v. Paszko, 391 Mass. 164, 187 n.26 (1984) (fact that no discovery order was in effect insignificant because judge took no action on representation no discoverable material existed); Banks v. Dretke, 540 U.S. 668 (2004)(state orally advised defense that state would provide all discovery without necessity of filing motions but failed to disclose police informant status of witness), citing Strickler v. Greene, 527 U.S. 263 (1999). *But see* Commonwealth v. Lopes, 25 Mass. App. Ct. 988 (1988) (because neither side could produce the report, judge need not sanction noncompliance with purported discovery agreement).

[142] Mass. R. Crim. P. 11(a)(2)(B).

[143] Commonwealth v. St. Pierre, 377 Mass. 650, 660–61 (1979). The example given described a prosecutor who avoided a probable-cause hearing, used solely hearsay at the grand jury, and did not memorialize witness statements. In such a case, the court suggested that dismissal of indictment might be an appropriate remedy, without prejudice to procuring a fresh indictment on better evidence. *St. Pierre* also prescribes a different remedy when the prosecutor suggests to her witnesses that they not speak to the defense, addressed *infra* at § 16.6F(6).

[144] Mass. R. Crim. P. 14(c) (sanctions for noncompliance generally); 14(a)(1)(C) (failure to provide automatic discovery for the defendant or reciprocal discovery for the prosecution may result in sanctions), 14(b)(1)(D) (exclusion of alibi witness or alibi rebuttal witness testimony), 14(b)(2)(B)(iv) (exclusion of certain

has a wide range of remedies available for noncompliance with a discovery order, including a further order for discovery, a continuance, exclusion of certain testimony, or "such other order as it deems just under the circumstances." Because Rule 14(c) sanctions are designed to protect a defendant's right to a fair trial, they are remedial in nature, not punitive; as a result, monetary sanctions against the Commonwealth are not authorized under this provision,[145] although, as noted below, they may be authorized under a statute for a willful violation.

The remedy for prosecutorial non-disclosure or delayed disclosure should be tailored to cure the prejudice to a defendant.[146] Sometimes recalling witnesses[147] or granting a continuance for investigation may be sufficient (and in any event counsel will be in a better appellate posture by seeking one without waiving rights to stronger remedies).[148] Sometimes, however, a continuance is not practical, or legally impermissible,[149] or cannot undo the damage inflicted (such as lost plea bargain opportunities or the use of witnesses or trial strategies that would not have been chosen had counsel not

---

defense insanity evidence), 14(b)(3) (exclusion of defense of license, claim of authority or ownership, or exemption).

[145] Commonwealth v. Frith, 458 Mass. 434 (2010); Commonwealth v. Carney, 458 Mass. 418 (2010); Commonwealth v. Mason, 453 Mass. 873 (2009).

[146] *See* Commonwealth v. Frith, *supra*, citing Commonwealth v. Cronk, 396 Mass. 194, 199 (1985) and Commonwealth v. Hine, 393 Mass. 564, 573 (1984).

[147] Commonwealth v. Baldwin, 385 Mass. 165, 176–77 (1982); Commonwealth v. Wilson, 381 Mass. 90, 115 (1980).

[148] According to Commonwealth v. Baldwin, 385 Mass. 165, 176–77 (1982), unless the delayed evidence is virtually destructive of the defendant's case or strongly supportive of innocence, the defendant should seek additional time for investigation (citing Commonwealth v. Cundriff, 382 Mass. 137, 150 (1980)). *See also* U.S. v. Van Anh, 523 F.3d 43, 51 (1st Cir. 2008) ("[b]ecause the defendants failed to ask for a continuance we seriously doubt they have preserved their delayed discovery claim"); U.S. v. Smith, 292 F. 3d 90 (2002)(failure to ask for continuance generally means counsel is satisfied he had sufficient opportunity to use the evidence); Commonwealth v. Molina, 454 Mass. 232 (2009) (where there was a delay in disclosure of potentially exculpatory evidence, failure to move for continuance undermined counsel's assertion that he was unable to prepare properly); Commonwealth v. Sanders, 451 Mass. 290 (2008) (defense counsel failed to ask for continuance to investigate new evidence disclosed at trial by immunized witness); Commonwealth v. Marrero, 436 Mass. 488, 496-497 (2002); Commonwealth v. Lopez, 433 Mass. 406, 413-414 (2001)(late-disclosed prosecution witness barred from case-in-chief but allowed and upheld as rebuttal testimony because this permitted defense adequate time to investigate); Commonwealth v. Emerson, 430 Mass. 378, 382 (1999); Commonwealth v. Giontzis, 47 Mass. App. Ct. 450 (1999)(where Commonwealth improperly delayed disclosure, limiting witness' testimony was sufficient; failure to provide continuance was not error in light of defendant's failure to request one); Commonwealth v. Hamilton, 426 Mass. 67, 71 (1997) (indication that there was no prejudice when defense counsel announced ready for trial after two-day continuance and did not seek further delay when late-disclosed fingerprint evidence was offered by Commonwealth later in trial); Commonwealth v. Gordon, 422 Mass. 816, 836 (1996) (where Commonwealth failed to notify defense of expected nature of prosecution expert's testimony, granting the defense time to locate its own expert witness was proper remedy); Commonwealth v. Richenburg, 401 Mass. 663, 671 (1988) (failure to request continuance after delayed disclosure of police report "tends to undermine the defendant's assertion that he would have pursued a different course of cross examination"); Commonwealth v. Gilbert, 377 Mass. 887, 896 (1979) ("suggestive" that counsel did not seek continuance); Commonwealth v. McCann, 20 Mass. App. Ct. 59, 66 (1985) (when undisclosed evidence surfaces at trial, preferred course is additional time for investigation, not mistrial); Commonwealth v. Janard, 16 Mass. App. Ct. 931, 933–34 (1983) ("of some interest to note" that counsel did not seek continuance or voir dire, nor investigate, following delayed disclosure).

[149] When the defendant is in custody, the court's power to grant a continuance without the defendant's consent is limited by statute to a thirty day period. M.G.L. c 276, § 35.

been kept in the dark).[150] In such cases, the courts have barred the offending party from using certain testimony or making certain claims;[151] declared a mistrial;[152] ordered a new trial;[153] or dismissed the

[150] The S.J.C. has recognized that late disclosure can severely prejudice the defense. In one case the court found that the prosecutor's "late, piecemeal, and incomplete disclosures forced on defense counsel the necessity of making difficult tactical decisions quickly in the heat of trial. . . . In retrospect, it may be thought that counsel did not use to maximum advantage those parts of the story he did finally secure out of the prosecutor's possession. But the defendant should not be held to a strict standard in order to patch over the prosecution's conduct." Commonwealth v. Ellison, 376 Mass. 1, 25–2 7 (1978). Just as "defense counsel may not know what evidence, if any, he will present until he has heard and evaluated the government's case" (Commonwealth v. Dupree, 16 Mass. App. Ct. 600, 603 (1983)), failure to disclose may result in defense investigative and trial choices based on wholly incorrect assumptions. *See also* Commonwealth v. Eneh, 76 Mass. App. Ct. 672 (2010) (delayed disclosure of bank records showing defendant had $14,000 in bank account was prejudicial and required new trial where defense counsel had portrayed defendant as penniless and homeless in opening statement); United States v. Olmstead, 832 F.2d 642 (1st Cir. 1988) (two-pronged test to determine whether delayed disclosure prejudicially altered defense strategy).

However, on many other occasions the courts have found little or no prejudice from nondisclosure. *See* cases cited *infra* at § 16.8E, regarding sanctions against Commonwealth.

A particularly devastating violation occurs when the defendant's statement is not disclosed. For example, in United States v. Padrone, 406 F.2d 560, 561 (2d Cir. 1969), a new trial was ordered because had the defendant been furnished with his statement he might not have taken the stand, a nondisclosure "so serious that…where it is apparent, as here, that his defense strategy may have been determined by the failure to comply, there should be a new trial." *See also* United States v. Lewis, 511 F.2d 798, 800–03 (D.C. Cir. 1975) (error not to exclude defendant's oral statement, first revealed during cross-examination of defendant, because delay prejudiced defense and may have deterred plea bargain); Commonwealth v. Blaikie, 375 Mass. 601, 606–08 (1978) (no error at second trial, but court notes that first trial ended in mistrial because officer testified to oral statement of defendant that had not been produced in discovery). *But see* Commonwealth v. Lapka, 13 Mass. App. Ct. 24, 30 (1982) (delayed disclosure of defendant's admission is usually unlikely to be prejudicial since timely disclosure would not have created reasonable doubt). Note, however, that *Lapka* used the standard of prejudice applied only when the defendant has not made a specific request for disclosure, as detailed *infra* at § 16.6A(2).

[151] *See, e.g.* Commonwealth v. Giontzis, 47 Mass. App. Ct. 450, 456–462 (1999) (judge properly limited scope of testimony from Commonwealth's rebuttal expert witness where Commonwealth failed to disclose appearance by such witness in violation of discovery order).

[152] When the defendant moves for a mistrial, double jeopardy does not bar a retrial unless government misconduct occurred that (1) was intended to goad the defendant into moving for mistrial or (2) resulted in irremediable harm making a fair trial no longer possible. Commonwealth v. Murchison, 392 Mass. 273, 276 (1984). *See* full discussion of double-jeopardy consequences of a mistrial *infra* at § 21.3. *See also* Commonwealth v. Ridge, 455 Mass. 307 (2009) (mistrial when Commonwealth disclosed it had a box of relevant materials that police had failed to disclose to defense);

[153] Commonwealth v. Merry, 453 Mass. 653 (2009) (undisclosed opinion of accident reconstructionist required new trial); Commonwealth v. Eneh, 76 Mass. App. Ct. 672 (2010) (late disclosure of bank records required new trial); Commonwealth v. Vaughn, 32 Mass. App. Ct. 435 (1992); United States v. Padrone, 406 F.2d 560, 561 (2d Cir. 1969) (defendant's statement not revealed, creating major prejudice when defendant took stand unaware of it); United States v. Lewis, 511 F.2d 798, 800–03 (D.C. Cir. 1975) (same). In n a case of delayed discovery, the Appeals Court stated that, "demonstrating the remedial effectiveness of a new trial is particularly crucial when the late disclosure involves inculpatory evidence because "where an undisclosed statement is inculpatory rather than exculpatory, prejudice is unlikely since even timely disclosure would not enable defense counsel 'to prepare and present its case in such a manner as to create a reasonable doubt that would not otherwise have existed.'" Commonwealth v. Conti, 71 Mass. App. Ct. 1101 (2007), citing *Commonwealth v. Lapka,* 13 Mass. App. Ct. 24, 30 (1982).

case with prejudice.[154] The latter is clearly required when potentially exculpatory evidence has been lost or destroyed so that no fair trial is possible.[155]

The court's discretion is broad; for example, it may order a mistrial even on a quite limited showing of prejudice.[156] But in order to preserve the defendant's rights, counsel should request specific relief, supported by reasoned arguments why the relief is necessary to avoid prejudice to a fair trial.[157]

When the issue of the timeliness of discovery disclosure is presented, the court inquires whether "the defendant is able to make effective use of the evidence in preparing and presenting the case."[158] If evidence later is disclosed which contradicts the defendant's theory of the case, the late disclosure is likely to have prejudiced the defendant and a new trial may result.[159] If the disclosure of evidence is made after the defense has rested, the defense cannot make "effective use" of the evidence and a mistrial may result.[160] And of course, a dismissal *barring retrial* is mandatory if the discovery violation has resulted in irremediable harm to the defendant's opportunity to obtain a fair trial.[161]

---

[154] Commonwealth v. Silva, 10 Mass. App. Ct. 784, 791 (1980) (failure to provide discovery before probable-cause hearing warranted dismissal with prejudice because district court must have the power to enforce its orders); United States v. Pollock, 417 F. Supp. 1332 (D. Mass. 1976) (retrial barred because government agents' destruction of investigatory notes prejudiced the defense, and also constituted bad-faith attempts to tamper with evidence).

[155] *See, e.g.* Commonwealth v. Sasville, 35 Mass. App. Ct. 15, 26–28 (1993) (indictment dismissed because destruction of alleged rape victim's aborted fetus, before blood tests could be performed to establish or negate defendant's paternity, deprived him of sole means to impeach alleged victim's credibility); Commonwealth v. Henderson, 411 Mass. 309 (1991) (indictment appropriately dismissed when victim's description of her assailant was lost and indictment occurred two years later); United States v. Pollock, 417 F. Supp. 1332, 1348 (D. Mass. 1976) (where government agent's notes were destroyed that might have corroborated drug defendant's claim that he was a government agent, no lesser sanction than dismissal would be adequate). *Compare* Commonwealth v. Waters, 420 Mass. 276 (1995) (no relief for failure to preserve police turret tape where police were at most negligent, defendant had not established reasonable possibility that the tape would have produced favorable evidence, trial court mitigated harm by permitting defendant to depose numerous witnesses, and there was overwhelming evidence of defendant's guilt).

[156] Commonwealth v. Baldwin, 385 Mass. 165, 177–78 (1982). *Cf.* Commonwealth v. Borders, 73 Mass. App. Ct. 911 (2009). But whatever the quantum required, the defendant does have "the burden of showing prejudicial consequences when seeking relief from disclosure delays by the Commonwealth." Commonwealth v. Lopez, 49 Mass. App. Ct. 1116 (2000). *See also* Commonwealth v. Donovan, 395 Mass. 20, 24 (1985); Commonwealth v. Green, 72 Mass. App. Ct. 903 (2008) (mistrial declared where Commonwealth failed to disclose exculpatory evidence).

[157] *See* Commonwealth v. Carney, 458 Mass. 418, 427 (2009) (discovery sanctions should be tailored appropriately to cure any prejudice resulting from a party's non-compliance and to ensure a fair trial); Commonwealth v. Fossa, 40 Mass. App. Ct. 563, 569 (1996) (forcing defendant to trial despite last-minute disclosure of important police report was not abuse of discretion where counsel simply stated his objection but did not "make any reasoned argument, assert any particular prejudice, or request specific relief").

[158] Commonwealth v. Felder, 455 Mass. 359, 367 (2009); Commonwealth v. Eneh, 76 Mass. App. Ct. 672 (2010); Commonwealth v. Baldwin, 385 Mass. 165, 175 & n.10 (1982); Commonwealth v. St. Germain, 381 Mass. 256, 262–63 (1980).

[159] Commonwealth v. Eneh, 76 Mass. App. Ct. 672 (2010)(new trial required where defense counsel's opening statement portrayed defendant as broke and Commonwealth thereafter turned over bank records showing that defendant had $14,000).

[160] Commonwealth v. Green, 72 Mass. App. Ct. 903 (2008).

[161] Commonwealth v. Hernandez, 421 Mass. 272, 276 ff. (1995) (dismissal must be based on evidentiary hearing and findings of irreparable prejudice). Commonwealth v. Lewin, 405 Mass. 566, 579 (1989); Commonwealth v. Cronk, 396 Mass. 194, 198–201 (1985); Commonwealth v. Light, 394 Mass. 112, 114 (1985); Commonwealth v. Murchison, 392 Mass. 273, 276 (1984); Commonwealth v. Lam Hue To, 391 Mass. 301, 310–12 (1984); Commonwealth v. Blaikie, 375 Mass. 601, 606–08 (1978).

The Reporter's Notes to Rule 14(c) state a preference that in fashioning sanctions for non-disclosure, "it is generally better to grant each party the freedom to present all relevant evidence at trial," with the exception of deliberate, prejudicial non-compliance with a notice of alibi order because the latter is so likely to be damaging.[162] It also notes that sanctions regarding mental illness defenses cannot be excluded except as provided by subdivision dealing with discovery of that defense, Rule 14(b)(2).

*Bad faith violations:* Sanctioning non-disclosure or delayed disclosure ordinarily is inappropriate in the absence of prejudice to the defendant,[163] but when the violation was committed in bad faith, a separate line of cases states that in egregious cases dismissal may be an appropriate prophylactic sanction. These are cases in which prosecutorial misconduct is egregious, deliberate, and intentional *or* results in a violation of constitutional rights.[164] This is sometimes referred to as the *Manning* rule because there the court first stated that "prophylactic considerations assume paramount importance in fashioning a remedy for deliberate and intentional violations of constitutional rights."[165] Although "any violation of a constitutional right gives rise to presumptive prejudice, which normally requires a reversal of the conviction,"[166] the Supreme Judicial Court has not yet fully settled whether intentional prosecutorial misconduct or deprivation of constitutional rights can justify a prophylactic dismissal when there is a showing of no "serious threat of prejudice" whatever to the defendant.[167]

---

[162] The Reporter's Notes regarding this state: "It is generally better to grant each party the freedom to present all relevant evidence at trial," with the exception of deliberate, prejudicial non-compliance with a notice of alibi order. It also notes that sanctions regarding mental illness defenses cannot be . However, in regard to alibi evidence, there is sufficient likelihood of abuse to require specifically empowering the court to exclude extrinsic alibi evidence other than the defendant's testimony, and this is specifically authorized by section (b)(1)(D). A court should only employ this sanction, however, when convinced that a failure to comply with an order was deliberate and prejudicial to the Commonwealth. Subdivision (c)(2) also provides that evidence concerning the defense of lack of criminal responsibility cannot be excluded except as provided by subdivision (b)(2)."

[163] Commonwealth v. Gonzalez, 437 Mass. 276, 280 (2002)(exclusion of Commonwealth's evidence for failure to provide discovery was inappropriate sanction where defendant did not demonstrate prejudice to case and nothing indicated that Commonwealth had acted intentionally or in bad faith).

[164] Commonwealth v. Mason, 453 Mass. 873 (2009) (trial judge dismissed case due to egregious police misconduct; SJC reversed because no prejudice to the defendant). Commonwealth v. Cronk, 396 Mass. 194, 198–201 (1985). *Accord* Commonwealth v. Light, 394 Mass. 112, 115 (1985) (see also Liacos dissent, arguing that denial of exculpatory evidence in this case constitutes sufficient egregiousness to warrant prophylactic dismissal); Commonwealth v. Jackson, 391 Mass. 749, 754 (1984) (purpose of *Manning* sanction not to rectify harm to defendant, since there was none, but to deter government agents from deliberate attempts to subvert fair trial); Commonwealth v. Silva, 10 Mass. App. Ct. 784, 791 (1980) (failure to provide discovery before probable-cause hearing warranted dismissal, and bars subsequent Supreme Court indictment because "it is essential that the District Court have the power to enforce any of its orders . . . [and it] is obvious that the Commonwealth felt that it could cavalierly disregard the orders of several District Court judges"). Commonwealth v. Blaikie, 375 Mass. 601, 606–08 (1978).

[165] Commonwealth v. Manning, 373 Mass. 438, 444 (1977).

[166] Commonwealth v. King, 400 Mass. 283, 290–91 (1987) (citing Commonwealth v. Manning, 373 Mass. 438 (1977)).

[167] *See* Commonwealth v. Mason, 453 Mass. 873 (2009) (acknowledging that SJC has suggested that egregious conduct alone might warrant dismissal of criminal charges but noting that court has never dismissed charges in the absence of prejudice to the defendant); Commonwealth v. Druce, 453 Mass. 686, 696 (2009) (an intentional violation by government agents of a defendant's right to counsel and fair trial could result in the dismissal of an indictment if it irremediably prejudices the defense); Commonwealth v. Williams, 455 Mass. 706, 718 (2010) ("where the Commonwealth has acted in bad faith or recklessly….the defendant may be independently entitled to a remedy" even absent any showing the evidence was potentially exculpatory or its loss prejudicial), citing Commonwealth v. Gliniewicz, 398 Mass. 744, 747-49 (1986); Commonwealth v. Lewin, 405 Mass. 566, 586 (1989) ("We have sometimes remarked that outrageous police conduct, not shown to be

Where a willful non-disclosure has occurred, punitive monetary sanctions, a contempt finding, or costs are also authorized pursuant to Mass. R. Crim. P. 48.[168]

# PART II: DEFENDANT'S RIGHT TO DISCOVERY

## §16.5 ADDITIONAL AVENUES FOR DEFENSE DISCOVERY BEYOND RULE 14

Since 2004, Massachusetts law has provided a great deal of automatic discovery, and mandates that motions for further discovery conform to its policy of "liberal discovery."[169] Sometimes, however, information may not be available through Rule 14 (which, for instance, is limited to items in the prosecution's possession, custody, or control). Moreover, according to the Supreme Court, "the Constitution does not require the prosecutor to share all useful information with the defendant there is no general constitutional right to unlimited discovery."[170]

This section compiles alternative routes which may be useful in obtaining such information.

### § 16.5A. CONSTITUTIONAL RIGHTS TO DISCOVERY

As just noted, the Supreme Court has never found an explicit, automatic right to general discovery. But in particular situations the prosecutor is constitutionally required to provide discovery to the defendant. The two clearest cases are (1) production of exculpatory evidence[171] and (2) discovery to

---

prejudicial to a fair trial, may require the dismissal of charges, but we have never dismissed charges in such a circumstance (although we have upheld the suppression of evidence in such situations)"); Commonwealth v. King, 400 Mass. 283, 290–92 (1987) (explicitly not deciding whether absence of serious threat of prejudice makes dismissal improper, but holding that "in the absence of a demonstrated need for deterrence, a prophylactic remedy is inappropriate"); Commonwealth v. Teixeira, 76 Mass. App. Ct. 101 (2010) (remanded for further findings and reconsideration of defendant's motions for dismissal or mistrial given egregious nature of alleged police misconduct); Commonwealth v. Drumgold, 423 Mass. 230, 245–46 (1996) (where suppression of statement obtained through deliberate government misconduct cured any prejudice, trial court correctly denied motion to dismiss indictment); Commonwealth v. Phillips, 413 Mass. 50 (1992) (reversing dismissal of indictments, because suppression of fruits of improper "search on sight" policy was sufficient); Commonwealth v. Viriyahiranpaiboon, 412 Mass. 224, 228–29 (1992) (written pretrial conference agreement is equivalent to court discovery order, but requires prejudice as prerequisite to sanctions for its violation) (citing Commonwealth v. Gliniewicz, 398 Mass. 744, 747 (1986)); Commonwealth v. Olszewski, 401 Mass. 749, 754 n.2 (1988)(stating "it would seem that [in another case] culpability, in the sense of bad faith destruction or falsification of evidence, could present an independent ground for remedial action," citing Miller v. Pate, 386 U.S. 1 (1967)); Commonwealth v. Cinelli, 389 Mass. 197, 208–10 (1983). *Cf.* Commonwealth v. Hernandez, 421 Mass. 272, 276ff. (1995) (vacating dismissal with prejudice for prosecutor's intentional refusal to provide court-ordered discovery, where judge failed to hold hearing and make findings of irreparable prejudice); Commonwealth v. Perrot, 38 Mass. App. Ct. 478 (1995) (proper to deny dismissal for egregious misconduct of prosecutor, who fabricated written "confession" of convicted defendant, where no prejudice resulted); United States v. Morrison, 449 U.S. 361, 364–65 (1981) (federal constitutional interpretation barring dismissal for right to counsel violation in absence of prejudice).

[168] Commonwealth v. Frith, 458 Mass. 434 (2010). As Frith notes, conduct is willful "when the actor intends both the conduct and its harmful consequences." *Id.,* citing Commonwealth v. Schuchardt, 408 Mass. 347, 352 (1990) and Commonwealth v. Peruzzi, 15 Mass. App. Ct. 437, 443, 446 N.E.2d 117 (1983)..

[169] Commonwealth v Durham, 446 Mass. 212, 221-22 (2006).

[170] United States v. Ruiz, 536 U.S. 622 (2002)("There is no general constitutional right to discovery in a criminal case.") In *Ruiz*, the Supreme Court upheld a plea as voluntary without prosecutorial disclosure of evidence that could impeach its case.

[171] *See infra* § 16.6A.

a defendant who is subject to a prosecutorial discovery order.[172] Additionally, in some cases a combination of circumstances may make discovery unusually important to assure state or federal constitutional guarantees,[173] such as (3) the right to counsel, which includes the right to an adequately prepared lawyer;[174] (4) the right to present a defense, which might be interpreted to include access to favorable information known to the government;[175] (5) the due process right to a fair trial, which includes a fair balance of forces between the state and the defendant [176] and which could arguably be construed in particular cases to require immunity for defense witnesses, probable-cause hearings or depositions to match the prosecutor's grand jury subpoena power, as well as more accepted requirements like the rights to access to Commonwealth witnesses and to independent testing of

[172] *See infra* § 16.8D.

[173] Although there is no constitutional right to full discovery of the prosecutor's files (*e.g.,* Commonwealth v. Monteiro, 396 Mass. 123, 129 (1985)), the courts have recognized that lack of discovery may combine with other events to deprive a defendant of constitutional rights. *See, e.g.,* California v. Trombetta, 467 U.S. 479, 486 (1984) ("the Federal Government might transgress constitutional limitations if it exercised its sovereign powers so as to hamper a criminal defendant's preparation for trial," such as by delaying indictment or deporting witnesses); Illinois v. Fisher, 540 U.S. 544 (due process did not require dismissal of charges where eleven years after defendant fled, potentially exculpatory evidence was destroyed in good faith pursuant to police departmental policy); Olszewski v. Spencer, 466 F.3d 47 (1st Cir. 2006) (loss of exculpatory evidence could result in due process violation); Commonwealth v. St. Pierre, 377 Mass. 650, 660–61 & n.13 (1979) (if prosecutor thwarts discovery by not memorializing witness statements, avoiding probable-cause hearings, using hearsay at the grand jury, etc., corrective measures may be appropriate, citing dismissal and, by implication, depositions); Commonwealth v. Silva, 10 Mass. App. Ct. 784, 790 (1980) ("the government's failures in this case as to discovery are intrinsically linked with the defendant's right to a speedy trial"). For further discussion and cited authorities, *see* AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES, § 270 (A.L.I.-A.B.A., 4th ed. 1984).

[174] *See supra* § 8.1C (ineffective assistance) and *infra* § 27.1B(5) (right to an adequately prepared lawyer).

[175] In California v. Trombetta, 467 U.S. 479, 485 (1984), which found no right to have the state preserve evidence that was not apparently exculpatory, the court noted that to safeguard the right to present a defense, the Supreme Court has developed " 'what might loosely be called the area of constitutionally guaranteed access to evidence' " (citing United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982)). *See also* Faretta v. California, 422 U.S. 806, 818 (1975) (dictum) (the Sixth Amendment rights to compulsory process, confrontation, and notice combine to constitutionalize the right in an adversary trial to make a defense); United States v. Nixon, 418 U.S. 683 (1974) (suggesting Sixth Amendment might require production of evidence); Roviaro v. United States, 353 U.S. 53 (1957) (right to identity of informers in some circumstances). United States v. Pesaturo, 519 F.Supp.2d 177 (D. Mass. 2007) (informant privilege must give way where identity is relevant and helpful to defense of accused or is essential to fair determination of the cause).

The Supreme Court has suggested that the "right of access to evidence" has usually been analyzed as a due process right, and that while it is "unsettled" what pretrial discovery rights are afforded by the compulsory process clause, it affords no broader protection than the due process clause. Pennsylvania v. Ritchie, 480 U.S. 39, 56 (1987). In Massachusetts, however, discovery rights have also been analyzed as part of the right to present a defense guaranteed by art. 12 of the Mass. Const. Declaration of Rights. In Commonwealth v. Balliro, 349 Mass. 505, 517–18 (1965), holding that the defense has a right to access to witnesses in Commonwealth custody, the court stated that "[t]o say that a defendant has a right to present his defence [sic] and then to deprive him of the means of effectively exercising that right would reduce the guarantee to an idle gesture. . . . It is too plain to be labored that the interviewing of prospective witnesses is an essential part of the preparation of a case for trial." *See also* Commonwealth v. Stockhammer, 409 Mass. 867 (1991) (denying defendant access to privileged records of complainant violates his rights under art. 12).

[176] Wardius v. Oregon, 412 U.S. 470, 474 (1973). *See* discussion *infra,* sec. 16.8D.

physical evidence by the defense;[177] or (6) the due process and Sixth Amendment rights to fair notice of the charges.[178] The Supreme Court has specifically rejected the claim that the Sixth Amendment confrontation clause provides any federal right to pretrial discovery, while finding that the due process right to material exculpatory evidence overrides a state's interest in confidentiality of child abuse records.[179][180]

## § 16.5B. STATUTORY DISCOVERY RIGHTS FOR DISTRICT COURT TRIALS AND PROBABLE CAUSE HEARINGS

Legislation that replaced de novo with a one-trial system in 1994 also conferred new discovery rights on the defendant, providing "mandatory" defense discovery of all items which were then categorized as "discretionary discovery" in the earlier version of Rule 14.[181] Rule 14's revision makes much of these statutory rights superfluous, but the statute remains significant as an independent source of discovery rights that in some respects goes further than Rule 14. For example, it provides a right to witness statements in the hands of the prosecution team whether or not the witness is intended for trial; and it requires disclosure of all "material and relevant evidence," a catchall that does not exist in Rule 14.

Under G.L. c. 218, § 26A, ¶ 2, the defendant is entitled, pursuant to a motion for discovery or a filed pretrial conference agreement: (1) to discover, inspect, and copy "any material and relevant evidence, documents, statements of persons, or reports of physical or mental examinations of any person or of scientific tests of experiments, within the possession, custody, or control of the prosecutor or persons under his direction and control" (note that this requires the prosecutor to actively inquire about, and convey, information residing with the police); (2) to a list of names and addresses of the Commonwealth's prospective witnesses; (3) to production by the Probation Department of the record of prior convictions of the Commonwealth's prospective witnesses; and (4) to all other information to which he is otherwise entitled (e.g., under Mass. R. Crim. P. 14 and case law).

---

[177] Pennsylvania v. Ritchie, 480 U.S. 39, 56 (1987) (right of access to evidence has been analyzed as a due process right); Commonwealth v. Neal, 392 Mass. 1, 8–9 (1984) (due process right to access to scientific evidence).

[178] Jackson v. Virginia, 443 U.S. 307, 314 (1979); In re Gault, 387 U.S. 1, 33 (1967); Cole v. Arkansas, 333 U.S. 196, 201 (1948). *Cf.* Commonwealth v. Montanino, 409 Mass. 500, 512 (1991), in which the court noted due process might be violated by the lack of fair notice in an indictment lacking reasonable particularity of time, place and circumstances. Commonwealth v. King, 445 Mass. 217 (2005) (defendant given fair notice of charges even though indictment failed to allege penetration as required for rape of a child charge); Commonwealth v. Erazo, 63 Mass. App. Ct. 624 (2005) (judge abused discretion in dismissing charges where precise dates not alleged in bill of particulars, defendant had reasonable knowledge of the crime so as to enable preparation of a defense). *But see* United States v. Agurs, 427 U.S. 97, 112 n.20 (1976) ("the notice component of due process refers to the charge rather than the evidentiary support for the charge").

[179] Pennsylvania v. Ritchie, 480 U.S. 39, 51–54 (1987).

[180] In Massachusetts, in a case in which the defendant claimed violations of his confrontation, compulsory process, and fair trial rights, the S.J.C., without stating the grounds on which it relied, found that the defendant's right to pretrial discovery had indeed been violated. Commonwealth v. Stockhammer, 409 Mass. 867, 881 (1991). *See also* Commonwealth v. Pare, 43 Mass. App. Ct. 566, 580 n.22 (1997) (error for trial judge to allow prosecutor to introduce, through witness, one-sided testimony regarding counselors' evaluation of alleged victim, after denying defense access to evaluation records; this ruling was unfair and had prejudicial impact on defendant's confrontation and due process rights under state and federal constitutions). *But see* Commonwealth v Durham, 446 Mass. 212 (2006)(rejecting confrontation and other constitutional claims regarding prosecutorial discovery on facts of that case); Commonwealth v. Righini, 63 Mass. App. Ct. 19 (2005) (failure to disclose law enforcement dates of birth not a violation of Confrontation Clause).

[181] G.L. c. 218, § 26A, ¶ 2. Further regulations governing discovery in district court were promulgated in 1995 in the District/Municipal Courts Rules of Criminal Procedure.

Additionally, Dist./Mun. Cts. R. Crim. P. 3 mandates that at or before arraignment the court shall ensure that the prosecution provides to the defense a copy of the defendant's record and a copy of the police statement required by Dist./Mun. Cts. R. Crim. P. 2 ("a written statement describing the facts constituting the basis for the arrest" or, if there was no arrest, "the police report, if any, relating to the alleged crime"). The Rule further provides that at arraignment the judge shall issue a written order to the parties to engage in a pretrial conference and to "provide, permit, and obtain discovery in accordance with G.L. c. 276, § 26A, and Mass. R. Crim. P. 14, in advance of the scheduled pretrial hearing.

The Supreme Judicial Court has recognized the importance of discovery motions in district court, including prior to probable-cause hearings where they may provide "the means for intelligent consideration of probable cause and . . . speed that part of the process along."[182]

The topic of district court discovery under the single-trial system is further addressed *supra* at § 3.4 and elsewhere in this chapter.

## § 16.5C. BROADER CASE LAW GOVERNS

As case law develops, cases in some instances may provide broader defense discovery rights than do the Rules. Moreover, nothing in the rules suggests that they were intended to abrogate prior holdings. Noting some differences between case law and prior Rule 14, the Appeals Court has stated that "until and unless the possible variance between the rule and the cases is dealt with by appropriate alteration or clarification of the rule itself, prosecutors should feel bound to comply with the broadest interpretation of the decided cases, possibly broader than the precise language of rule 14(a)(1)(A)."[183]

## § 16.5D. STATE AND FEDERAL LAWS AFFORDING ACCESS TO PUBLIC RECORDS

*Massachusetts public records:* Under the Massachusetts Public Records Law , public records are subject to mandatory public disclosure on request.[184] Public records are broadly defined to include all documentary material or data, regardless of physical form, made or received by an officer or employee of the Commonwealth, unless statutorily exempted.[185] Moreover, there is a presumption that

[182] Commonwealth v. Silva, 10 Mass. App. Ct. 784, 791 (1980).

[183] Commonwealth v. Lapka, 13 Mass. App. Ct. 24, 30–31 (1982).

[184] G.L. c. 66, § 10(a) (right of access); G.L. c. 4, § 7(26) (definition of public records).

[185] G.L. c. 4, § 7(26); Geourgiou v. Comm'r of Dep't. of Indus. Accidents, 67 Mass. App. Ct. 428, 432 (2006)(given the statutory presumption in favor of disclosure, exemptions must be strictly construed), citing Attorney General v. Assistant Comm'r of Real Property Dep't, 380 Mass. 623, 625 (1980). *See also* Attorney General v. Board of Assessors of Woburn, 375 Mass. 430, 432 (1978).

G.L. c. 4, § 7, contains several exceptions including: (1) investigatory materials the disclosure of which would prejudice effective law enforcement, c. 4, §7(26)(f); (2) invasion of personal privacy of a specifically named individual, c. 4, § 7(26)(c); and (3) criminal offender record information ("CORI," *see* G.L. c. 6, §§ 167 *et seq*.) that may not be disclosed to the general public. (Materials privileged as work product under Mass. R. Civ. P. 26(b)(3) are not protected from disclosure under the public records law unless specifically exempted therein. Antell v. Attorney-General, 52 Mass. App. Ct. 244, 248 (2001). These materials may be deleted from the reports, rather than preventing disclosure of the entirety. But analyzing the Act's application to police records, the S.J.C. in Reinstein v. Police Comm'r, 378 Mass. 281, 289–90 (1979), stated:

> "There is no blanket exemption provided for records kept by police departments" [citing Bougas v. Chief of Police, 371 Mass. 59, 65 (1976).] Nor does the statute exempt all investigatory materials; instead it invites case-by-case consideration of whether access "would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest." That some exempt material may be found in a document or report of an investigatory character does not justify cloture as to all of it.

all governmental documents are public records,[186] and exemptions must be strictly construed.[187] To obtain a public record, one must submit a request to the state or local government custodian of the particular records. A guide to the public records law is available on line at www.sec.state.ma.us/pre/prepdf/guide.pdf.

*For federal records*, the Freedom of Information Act[188] may provide a route for disclosure of records kept by the FBI, Justice Department, or other executive agencies. There are several exemptions,[189] including one for some law enforcement materials if they bear certain characteristics.[190] In the event of a rejection by the agency, the requester may appeal to challenge the exemption cited. If the appeal is denied, the requester may file suit and the government bears the burden of justifying its nondisclosure.[191]

For details on the FOIA law, *see* www.foia.gov/about.html. For a helpful flowchart illustrating the steps triggered by an FOIA request, *see* www.gwu.edu/~nsarchiv/nsa/foia/foia_flowchart.pdf.

---

Any portion that is exempt from disclosure must be segregated with the remainder of the document disclosed. *Reinstein v. Police Comm'r, supra,* 378 Mass. 281 at 294–95. *See also* Worcester Telegram and Gazette Corp. v. Chief of Police of Worcester, 436 Mass. 378, 385 (2002)(act does not permit "defendants to decide unilaterally, without any oversight, [which] documents are subject to disclosure" and which are exempt); Commonwealth v. Holt, 1995 WL 670141 at 1 (Mass. Super. 1995) (daily police logs are public records, not within CORI exemption); Globe Newspaper Co. v. Police Comm'r, 419 Mass. 852 (1995) (detailed discussion and application of privacy, investigatory, and grand jury exemptions).

Material exempted from disclosure pursuant to the public records law is not automatically privileged from discovery if a criminal defendant moves for its production. Commonwealth v. Wanis, 426 Mass. 639, 643 (1998) (whether or not exempt, statements of percipient witnesses in hands of police internal affairs division may be discoverable). *See also* In re Subpoena Duces Tecum, 445 Mass. 685, 690 (2006) (investigatory materials exemption did not apply to bar disclosure by district attorney of videotapes of SAIN interviews with alleged minor sex abuse victims in civil action filed by parents of alleged victims).

[186] In re Subpoena Duces Tecum, 445 Mass. 685, 690 (2006) (presumption that record sought is public); G.L. c. 66, § 10(c); 950 C.M.R. § 32.08(4) (1983). A record custodian must demonstrate that an exemption applies in order to withhold disclosure of a document. 950 C.M.R. § 32.08(1) (1983).

[187] Geourgiou v. Comm'r of Dep't. of Indus. Accidents, 67 Mass. App. Ct. 428, 432 (2006).

[188] 5 U.S.C. § 552.

[189] *See* 5 U.S.C. § 552(b).

[190] Under 5 U.S.C. § 552(b)(7), law enforcement records are exempt only to the extent that they would interfere with enforcement proceedings, would deprive a person of a fair trial, would cause an unwarranted invasion of privacy, would disclose confidential sources or law enforcement techniques, or could endanger a person's physical safety. *See* National Archives and Records Admin. v. Favish, 541 U.S. 157 (2004)(FOIA exemption for "records or information compiled for law enforcement purposes" recognizes surviving family members privacy interest with respect to death scene images of close relative); Department of Justice v. Reporters Comm., 489 U.S. 749 (1989) (FBI "rap sheets" exempt from FOIA disclosure); John Doe Agency v. John Doe Corp., 493 U.S. 146 (1989) (exemption can apply to records originally compiled for other purposes which were later assembled for law enforcement purposes). The Supreme Court has rejected a claim that all sources supplying information to the FBI should be treated as "confidential" and therefore exempt from FOIA disclosure, and held that a showing must be made based on agreement, generic circumstances, or other factors. United States v. Landano, 508 U.S. 165 (1993).

[191] 5 U.S.C. § 552(a)(4)(B). Under subsection (a)(4)(E), the court may assess attorney's fees against the government. A civil action, including an FOIA case, "shall be expedited if good cause therefor is shown." 28 U.S.C.A. § 1657(a).

### 16.5E. SUMMONSES

The constitutional and statutory right to summons witnesses and objects is addressed *supra* at ch. 13. Although the summons power "is not intended to subvert the discovery rule,"[192] proceeding by summons is often required to obtain information, as when exculpatory or other evidence is in the control of a third party rather than the prosecutor. See full discussion of summonsing documents supra at sec. 16..3C

### 16.5F. BILL OF PARTICULARS

A request for a bill of particulars is not a discovery motion but, if granted, does require the Commonwealth to notify the defendant and the court of the time, place, manner, and means of the crime charged. This subject is addressed *infra* at § 20.5.

### § 16.5G. DEPOSITIONS UNDER THE CRIMINAL RULES

The Criminal Rules contain several provisions authorizing depositions for the purpose of preserving testimony. These apply: (1) when the attorneys and a witness for either side is present in court but the defendant defaulted, and requiring the return of the witness would constitute a hardship;[193] (2) when a party requests a continuance and a witness is present in court;[194] and (3) under Rule 35, whenever, "due to exceptional circumstances, and after a showing of materiality and relevance, it is deemed to be in the interest of justice" that testimony be taken and preserved, or whenever the parties agree to a deposition and the court consents.[195]

By its terms, Rule 35 depositions may be an appropriate vehicle for discovery in cases where conventional discovery is not sufficient. Stating that corrective measures may be mandated when the prosecutor thwarts discovery, the Supreme Judicial Court has cited the widespread use of depositions in other states as one possibility.[196]

### 16.5H. PRETRIAL MOTIONS AND EVIDENTIARY HEARINGS

The investigative potential of pretrial hearings involving the present case should be fully considered: testimony may be taken at a probable-cause hearing,[197] suppression hearing,[198] *Franks*

[192] Reporter's Notes to Rule 17 (2006).

[193] Mass. R. Crim. P. 6(d)(2).

[194] Mass. R. Crim. P. 10(c)

[195] Mass. R. Crim. P. 35(a), (i). The testimony may be used at trial if the witness becomes unavailable or as impeachment. Mass. R. Crim. P. 35(g). *But see* Commonwealth v. Tanso, 411 Mass. 640 (1992) (Rule 35 deposition erroneously admitted when defendant not ordered to either cross- examine or waive it); Commonwealth v. DiBenedetto, 414 Mass. 37, 39–41 (1993) (error in *Tanso, supra,* not harmless).

[196] Commonwealth v. St. Pierre, 377 Mass. 650, 660–61 & n.13 (1979). The S.J.C. stated that dismissal would be an appropriate corrective measure when the prosecutor thwarts discovery by such steps as not memorializing witness statements, avoiding probable-cause hearings, and using hearsay at the grand jury; presumably a deposition would suffice where a lesser discovery deprivation occurred.

[197] In Myers v. Commonwealth, 363 Mass. 843, 857 (1973), the court stated that discovery is a legitimate purpose of the probable-cause hearing. The techniques for maximizing the discovery and impeachment potential of a probable-cause hearing are addressed *supra* at § 2.2.

[198] For example, at a motion to suppress identification the victim will be testifying on the same issues that will comprise his trial testimony. Therefore, a motion to suppress identification can be used to obtain during cross-examination a thorough record of all the facts, which in severely edited form may provide the defense theory or material for cross-examination.

hearing based on a threshold showing of false statements in a warrant affidavit,[199] possibly arraignment, inquest, and so on. Other motions that might "smoke out" the prosecution's theories include motions to dismiss, for severance or consolidation, or for reduction of bail. To the extent that defense counsel seeks discovery from evidentiary hearings, she should consider the strategic considerations detailed *supra* at § 2.2.

## §16.6 DEFENSE DISCOVERY BY SUBJECT MATTER

This section discusses common motions for criminal discovery, divided by subject matter. But in particular circumstances unconventional discovery motions may be called for; remember that Rule 14(a)(2) allows the court in its discretion to order the Commonwealth to turn over to the defendant "other material and relevant evidence."

### § 16.6A. EXCULPATORY EVIDENCE

#### 1. Material That Must Be Provided to the Defense

In Massachusetts, the prosecutor is required to turn over facts of an exculpatory nature under both the automatic discovery provision of Rule 14[200] and the Supreme Judicial Court ethical rules.[201] Such discovery is also constitutionally required. *Brady v. Maryland* held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[202] However, there is no constitutional requirement that exculpatory impeachment evidence be disclosed prior to a plea, and failure to do so does not vitiate the voluntariness of the plea.[162.5]

*Brady* and its progeny establish that even in the absence of a defense motion or request,[203] the due process clause requires the prosecutor to disclose evidence that is (1) in the knowing or unknowing possession or control of the prosecution team, (2) unknown to the defense, (3) exculpatory, *and* (4) material. This duty applies whenever the evidence is discovered, even after conviction.[204] To assure discovery, or a new trial in the event of nondisclosure, counsel should identify and move for specific items sought whenever possible, because the "materiality" requirement is more lenient for specific requests.[205] We address each of these elements in turn.

---

[199] *See* Commonwealth v. Ramirez, 416 Mass. 41 (1993), ordering *Franks* hearing, and discussion *infra* at § 17.8E.

[200] Mass. R. Crim. P. 14(a)(1)(iii).

[201] Mass. R. Prof. C. 3.8(d), formerly S.J.C. Rule 3:07, DR 7-109(A).

[202] Brady v. Maryland, 373 U.S. 83, 87 (1963). *See also* Strickler v. Greene, 527 U.S. 263, 281-282 (1999)(a Brady claim must show that the evidence was favorable to the accused, either because exculpatory or impeaching; was suppressed by the State, either willfully or inadvertently; and prejudice).

[162.5] U.S. v. Ruiz, 536 U.S. 622 (2002). Note, however, that Rule 14(a)(1)(A) requires the Commonwealth to provide exculpatory evidence at or prior to the pretrial hearing.

[203] Strickler v. Greene, 527 U.S. 263 (1999).

[204] Imbler v. Pachtman, 424 U.S. 409, 427 (1976). *See also* Skinner v. Switzer, 131 S. Ct. 1289 (2011); Banks v. Dretke, 540 U.S. 668 (2004)(prosecutorial misconduct for failing to disclose witness's paid informant status at trial and only admitting to informant's status at Supreme Court oral arguments); Commonwealth v. Daniels, 445 Mass. 392 (2005) (defendant made prima facie case for post-conviction discovery).

[205] The Reporter's Notes to Rule 14 state: "Although exculpatory evidence is included within automatic discovery, if the defense is aware of items that may be exculpatory that have not been delivered by the pretrial

*a. Knowing or Unknowing Possession of the Prosecution Team*

The general rule is that the prosecutor is obligated to disclose all exculpatory evidence that is in the "possession, custody, or control of the prosecutor, persons under the prosecutor's direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecutor's office or have done so in this case,"[206] and there is no requirement that the prosecution search for exculpatory evidence from elsewhere.[207] However, the evidence need not be personally known to the prosecutor if it is in the possession, custody or control of others involved in the case, including prosecution employees,[208] the police,[209] any governmental official or other person

---

conference, it should file a discovery motion specifying that evidence under subdivision (a)(2), as the magnitude of the error in non-disclosure is in part a function of the specificity of the motion. Commonwealth v. Tucceri, 412 Mass. 401 (1992); Commonwealth v. Gallarelli, 399 Mass. 17, 21 n.5 (1987)."

[206] Mass. R. Crim. P. 14(a)(1)(A). This standard is adopted from Commonwealth v. Tucceri, 412 Mass. 401, 407 (1992) and Commonwealth v. Daye, 411 Mass. 719, 734 (1992). *See also* Commonwealth v. Murray, 461 Mass. 10, 19 (2011)(police officer subject to prosecutor's control when acts as government agent in investigation and prosecution of the case) and full discussion of this language *supra* at § 16.3A.

[207] Failure to obtain exculpatory evidence is not suppression of evidence, at least where there is no allegation that the defendant was denied access to the witness. Commonwealth v. Stone, 366 Mass. 506, 511 (1974). The SJC's Standing Advisory Committee on the Criminal Rules considered the issue in 1996 and concluded that "there is no duty on the prosecutor to investigate specifically for exculpatory evidence," nor should there be." 11/5/96 memorandum, on file with author.

*See also* Arizona v. Youngblood, 488 U.S. 51 (1988) (police do not have a constitutional duty to perform any particular tests); Commonwealth v. McGowen, 458 Mass. 461 (2010) (prosecution cannot be said to suppress what is not in their control; no error where prosecution did not disclose administrative problems in state DNA lab); Commonwealth v. Thomas, 451 Mass. 451 (2008) (prosecutor's duty to disclose exculpatory evidence does not extend beyond information held by agents of the prosecution team); Commonwealth v. Boateng, 438 Mass. 498 (2003) (police had no duty to collect and test blood and vomit found at murder scene); Commonwealth v. Martinez, 437 Mass. 84 (2002)(no duty to find exculpatory evidence); Commonwealth v. Richardson, 49 Mass. App. Ct. 82 (2000)(same); Commonwealth v. Rivera, 424 Mass. 266, 274 (1997) (where no evidence that police failure to test for presence of gunpowder residue on hands of defendant and other arrested suspects was unreasonable or calculated to deprive defendant of potentially exculpatory evidence, and judge did allow defense to argue point on closing, not error to refuse jury instruction on point; decision whether to instruct jury regarding failure to conduct forensic tests is discretionary) (citing Commonwealth v. Cordle, 412 Mass. 172, 177 (1992)); Commonwealth v. Neal, 392 Mass. 1, 8 (1984); Commonwealth v. Campbell, 378 Mass. 680, 702 (1979); Commonwealth v. Adrey, 376 Mass. 747, 753–54 (1978); Commonwealth v. Lewinski, 367 Mass. 889–900 (1975) (no due process violation to fail to type sperm from female murder victim where not negligent); Commonwealth v. Mathews, 10 Mass. App. Ct. 888, 889 (1980). *But see* Commonwealth v. Santiago, 30 Mass. App. Ct. 207, 221–22, n.5 (1991) (advising that in taking notes, police officers should at least note exculpatory statements or the fact that none were made).

[208] "[T]he 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." Kyles v. Whitley, 514 U.S. 419, 437 (1995); Cone v. Bell, 129 S. Ct. 1769 (2009) (obligation to disclose evidence may be broader under statutory and ethical rules); Commonwealth v. Frith, 458 Mass. 434, 440-441 (2010)(duty of reasonable inquiry); Commonwealth v. Lykus, 451 Mass. 310 (2008) (prosecution has duty to learn of exculpatory evidence known to others acting on the government's behalf, here the FBI); Commonwealth v. Tucceri, 412 Mass. 401, 407 (1992); Commonwealth v. St. Germain, 381 Mass. 256, 261 & n.8 (1980) (prosecutor's obligations also extend to material in possession of staff and investigators, and prosecutor's burden to assure communication between staff, citing ABA Standards for Criminal Justice, Standards Relating to Discovery and Procedure before Trial, Standard 2.1(d) (Approved Draft 1970), and Giglio v. United States, 405 U.S. 150, 154 (1972)). *Cf.* Commonwealth v. Connor, 392 Mass. 838, 851 (1984) (could be argued that composite knowledge of two assistant district attorneys constituted exculpatory information).

whose actions could be imputed to the prosecution,[210] or even in some circumstances in the possession of the federal authorities.[211] More broadly, it is irrelevant whether *anyone* in the government knows that

[209] Rule 14(a)(1) "reaches police officers who are participants in the investigation and presentation of the case and police officers who regularly report to the prosecutor or did so in reference to a particular case." Commonwealth v. Wanis, 426 Mass. 639, 643–44 (1998) (where no showing that prosecutor had access to records of police internal affairs division, or that the division was obliged to provide files to prosecutor, improper to order prosecutor to produce witness statements in division files; however, a prosecutor who has possession or control of such records must review that material) (citing Commonwealth v. Daye, 411 Mass. 719, 734 (1992). *See also* Commonwealth v. Frith, 458 Mass. 434 (2010) (error attributable to Commonwealth where undisclosed police report unknown to prosecutor but known to police); Commonwealth v. Calliot, 454 Mass. 245 (2009) (failure of prosecution to disclose that state police possessed two guns that local police recovered that may have been murder weapons was not error where guns collected in different case); Commonwealth v. Eneh, 76 Mass. App. Ct. 672, 677 (2010) (police delay in turning over bank records attributable to Commonwealth); Commonwealth v. Lewin, 405 Mass. 566, 580 (1989) (police misconduct attributable to prosecution); Commonwealth v. Martin, 427 Mass. 816, 823-24 (1998); Commonwealth v. Olszewski, 401 Mass. 749, 753 (1988) (nondisclosure due to "inept and bungling performance of the police . . . is attributed to the prosecutor"); Commonwealth v. Baldwin, 385 Mass. 165, 177 n.12 (1982) (evidence in possession of police is *Brady* material even if prosecutor is unaware of it); Commonwealth v. Redding, 382 Mass. 154, 157 (1980); Commonwealth v. St. Germain, 381 Mass. 256, 261 (1980). *Cf.* Commonwealth v. Light, 394 Mass. 112, 114 (1985) (police prosecutor held to same standard as lawyer prosecutor); Kyles v. Whitley, 514 U.S. 419, 438 (1995) ("[N]o one doubts that police investigators sometimes fail to inform a prosecutor of all they know. But neither is there any serious doubt that "procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it.") (quoting Giglio v. United States, 405 U.S. 150, 154 (1972)). *See also* United States v. Pollock, 417 F. Supp. 1332, 1345 (D. Mass. 1976) (in federal prosecution, *Brady* reaches all agencies of the federal government involved in any way in the prosecution).

[210] Commonwealth v. Ira I, 439 Mass. 805 (2003) (prosecutor's failure to turn over statements made by juvenile defendants to assistant principal not imputed to Commonwealth where assistant principal did not participate in investigation or evaluation of case); Commonwealth v. Martin, 427 Mass. 816, 823-24 (1998)(reversing a conviction because the prosecutor failed to turn over evidence he did not know existed, but which was known to the Commonwealth crime lab); Commonwealth v. Sasville, 35 Mass. App. Ct. 15, 20 at n.4 (1993) (aborted fetus in possession of New York doctor passed into Commonwealth's control once alleged victim's mother told police that doctor had preserved fetus in case district attorney's office wanted blood tests); Commonwealth v. Mathews, 10 Mass. App. Ct. 888 (1980) (citing Commonwealth v. St. Germain, 381 Mass. 256, 261 n.8 (1980)). In Pennsylvania v. Ritchie, 480 U.S. 39 (1987), the Supreme Court found that the due process right to exculpatory evidence extended to information possessed by a state agency that investigated child abuse, even though the prosecution might have no access to the information. Similarly, in Commonwealth v. Gallarelli, 399 Mass. 17, 20 n.4 (1987), the court found as a matter of law that a state laboratory report was under prosecutorial control, even though no prosecutor had a copy of it nor knew of its existence. The Insurance Fraud Bureau, though funded by insurance companies, has a sufficiently "close and coordinated relationship" with the Attorney-General's office that its actions may be imputable to the Commonwealth. Commonwealth v. Harwood, 432 Mass. 290, 299 (2000); Commonwealth v. Ellis, 429 Mass. 362, 364-366 )1999). *See also* Commonwealth v. Soucy, 17 Mass. App. Ct. 471, 474 (1984) *(Brady* extends to report of private security guard who participates in prosecution, even if prosecutor unaware of report).

[211] Commonwealth v. Lykus, 451 Mass. 310 (2008) (F.B.I's failure to turn over voiceprint laboratory report imputable to Commonwealth); Commonwealth v. Smith, 450 Mass. 395, 409 (2008) (no error where Commonwealth did not turn over witness agreement federal authorities had with cooperating witness but in certain circumstances Commonwealth is required to seek exculpatory material from federal authorities); Commonwealth v. Donahue, 396 Mass. 590, 600–02 (1986) (new trial ordered because prosecutor did not seek FBI reports from the FBI); Commonwealth v. Liebman, 388 Mass. 483, 486–87 (1983) *(Liebman II),* and Commonwealth v. Liebman, 379 Mass. 671, 675 (1980) *(Liebman I)* (although ordinarily prosecutor's obligation is to disclose only information in his possession or the police's, to avoid unfairness stemming from two sovereignties, defendant had right to prior inconsistent statements in federal grand jury transcript). In *Donahue, supra,* 396 Mass. at 599, the court noted four factors that help determine whether the state is obligated to deliver

the evidence would help exculpate the defendant; good faith is no argument against reversal of a conviction for nondisclosure.[212] Additionally, a specific request of particular exculpatory information may impose a particular duty to search for and produce it.[213]

*b. Unknown to the Defense*

When the defense already knows of the exculpatory material, there is no "suppression" of it by the prosecution or prejudice to the defense.[214]

*c. Exculpatory*

The defendant must show that the non-disclosed evidence was exculpatory.[215] Exculpatory evidence is not a narrow term connoting alibi or other complete proof of innocence but is any evidence that tends to negate guilt or support innocence.[216] It includes any significant evidence that corroborates the defendant, calls into question a material although not indispensable element of the case, or

exculpatory evidence held by federal authorities: state-federal cooperation in the prosecution, lack of defense access to the evidence, a minimal burden on the prosecutor to make a request of federal authorities, and potential unfairness to the defendant. It noted that normally the state would be obligated on request to produce the federal "rap sheet" of witnesses to the defendant since they were available as a matter of course to the state, or grand jury minutes in cases of cooperation between the sovereignties.

[212] Brady v. Maryland, 373 U.S. 83, 87 (1963). *Accord* United States v. Agurs, 427 U.S. 97, 119 (1976) ("If evidence highly probative of innocence is in his [the prosecutor's] file, he should be presumed to recognize its significance even if he has actually overlooked it. . . . If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor"); Giglio v. United States, 405 U.S. 150, 153–54 (1972). Commonwealth v. Merry, 453 Mass. 653 (not intentional but new trial required); Commonwealth v. Gallarelli, 399 Mass. 17, 20 n.4 (1987); Commonwealth v. Connor, 392 Mass. 838, 851 (1984); Commonwealth v. Ellison, 376 Mass. 1, 24 n.14 (1978).

[213] Commonwealth v. Daniels, 445 Mass. 392 (2005) (denial of defendant's pretrial discovery request did not absolve Commonwealth of duty to examine the specifically requested material and produce favorable evidence to the defendant); United States v. Osorio, 929 F.2d 753, 761 (1st Cir. 1991) (government had duty to search for and produce witness's history of drug involvement on defense request).

[214] Commonwealth v. Mac Hudson, 446 Mass. 709 (2006) (by the time of the second trial all parties well aware that witness recanted testimony, letters to that effect not exculpatory); Commonwealth v. Schand, 420 Mass. 783, 789–90 (1995); Commonwealth v. Mercado, 383 Mass. 520, 524 (1981); Commonwealth v. Rooney, 365 Mass. 484, 490–91 (1974); Commonwealth v. Heffernan, 350 Mass. 48 (1966) (because defense investigator but not defense counsel knew of prior inconsistent statement, no *Brady* violation).

[215] Commonwealth v. Healy, 438 Mass. 672, 679 (2003).

[216] Commonwealth v. Murray, 461 Mass. 10, 19 (2011); Commonwealth v. Daniels, 445 Mass. 392, 401 (2005)(to be "exculpatory," evidence need not be absolutely destructive of the Commonwealth's case or highly demonstrative of the defendant's innocence; it need only tend to negate the defendant's guilt). *See also* Commonwealth v. Williams, 455 Mass. 706, 715 n. 6 (2010); Commonwealth v. Laguer, 448 Mass. 585, 595 (2007); Commonwealth v. St. Germain, 381 Mass. 256, 261 n.6 (1980); Commonwealth v. Wilson, 381 Mass. 90, 107 n.37 (1980); Commonwealth v. Ellison, 376 Mass. 1, 22 n.9 (1978); Commonwealth v. Pisa, 372 Mass. 590, 595, *cert. denied,* 434 U.S. 869 (1977). In *Ellison,* the court added:

[M]aterial may be within *Brady* although it is not absolutely destructive of the Commonwealth's case or highly demonstrative of the defendant's innocence. The *Brady* obligation comprehends evidence which provides some significant aid to the defendant's case, whether it furnishes corroboration of the defendant's story, calls into question a material, although not indispensable, element of the prosecution's version of the events, or challenges the credibility of a key prosecution witness.

challenges credibility of a key prosecution witness.[217] Additionally, evidence that could favorably affect the *sentence* is *Brady* material.[218] However, in the latter case nondisclosure may not require a new trial but only a new sentencing.

The following evidence has been found to "exculpate" within the meaning of the *Brady* rule:

*Evidence demonstrating innocence or another's guilt:* Obviously, this is the most directly exculpatory evidence possible, whether it be an eyewitness who says the defendant does not resemble the culprit,[219] a defendant's statement to police,[220] a fingerprint[221] or other forensic evidence[222] that does not match the defendant's exemplar, or a videotape demonstrating sobriety in an "OUI" case.[223] An eyewitness statement that does not mention any involvement by the defendant is also exculpatory.[224] Out-of-court identification procedures will result in exculpatory evidence if another person was identified, or the defendant or his photograph was shown and not identified.[225] The

[217] Banks v. Dretke, 540 U.S. 668, 691 (2004) (witness's paid informant status is *Brady* material); Commonwealth v. Vaughn, 32 Mass. App. Ct. 435 (1992) (change in key witness's testimony); Commonwealth v. Green, 72 Mass. App. Ct. 903 (2008); Commonwealth v. Tucceri, 412 Mass. 401, 414 (1992); Commonwealth v. Gregory, 401 Mass. 437, 442 (1988); Commonwealth v. Shipps, 399 Mass. 820, 835 (1987). *Compare* Commonwealth v. LaGuer, 448 Mass. 585, 595-6 (2007)(undisclosed non-defendant fingerprint was not exculpatory).

[218] Cone v. Bell, 129 S. Ct. 1769 (2009) (remanded for full review of impact of improperly suppressed evidence of defendant's drug addiction on his sentence); U.S. v. Bagley, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985); Commonwealth v. Capparelli, 29 Mass. App. Ct. 926, 929 (1990) (rescript). Indeed, in *Brady* the evidence was material only to punishment because it was inadmissible as to guilt. By this standard, a juvenile bind-over hearing should be subject to the *Brady* rule. *Cf.* Commonwealth v. Roberts, 362 Mass. 357, 362 (1970) (assuming without deciding that exculpatory discovery requirements apply to juvenile bind-over hearings).

[219] Commonwealth v. Bennett, 43 Mass. App. Ct. 154 (1997) (new trial ordered where prosecution withheld evidence that victim had received harassing telephone calls from person with access to her stolen pocketbook at a time when defendant was being held in detention); Commonwealth v. Tucceri, 412 Mass. 401 (1992) (new trial properly ordered where defendant not provided with photo two hours after incident which showed him to have mustache, where assailant was clean shaven). *Cf.* Commonwealth v. Daniels, 445 Mass. 392, 401 (2005) (improperly suppressed statement of eyewitness linked a different individual to the murder);

[220] Commonwealth v. Dubois, 451 Mass. 20 (2008).

[221] This example was cited as an archetypal example of evidence which must be disclosed even absent a defense request in *Agurs. See also* Commonwealth v. Olszewski, 401 Mass. 749, 757 (1988) (new trial required because lost belt, alleged murder weapon, might have inculpated another through fingerprints, worn belt hole, etc.); Commonwealth v. Laguer, 448 Mass. 585, 595 (2007) (in the usual circumstances of case fingerprint evidence not exculpatory).

[222] Commonwealth v. Merry, 453 Mass. 653 (2009) (new trial where undisclosed opinion report of accident reconstruction expert that defendant was not sitting up at time of accident exculpatory because defendant claimed to be having a seizure); Commonwealth v. Lykus, 451 Mass. 310 (2008) (FBI voiceprint analysis report that stated it voice of unknown caller could not be matched with voice of defendant is exculpatory); Commonwealth v. Light, 394 Mass. 112 (1985) (new trial ordered because police did not disclose that paint chips resulting from accident did not match defendant's car).

[223] Commonwealth v. Holman, 27 Mass. App. Ct. 830, 831 (1989); Commonwealth v. Cameron, 25 Mass. App. Ct. 538, 547 (1988).

[224] Commonwealth v. Ellison, 376 Mass. 1 (1978); Commonwealth v. Daniels, 445 Mass. 392, 395 n.3 (2005) (witness's four statements to police did not mention opportunity to see unmasked assailant).

[225] Commonwealth v. Lykus, 451 Mass. 310 (2008); Commonwealth v. Daniels, 445 Mass. 392 (2005). *Cf.* Commonwealth v. Tucceri, 412 Mass. 401 (1992) (new trial ordered because booking photograph of defendant not disclosed, which showed him with mustache where culprit was clean-shaven); Commonwealth v. Daniels, 445 Mass. 392, 396-399 (2005) (witness did not identify defendant and identified other suspects). *See also infra* § 16.6J.

defendant also has a right to evidence "that another person recently committed a similar crime by similar methods, since such evidence tends to show that someone other than the accused committed the particular crime."[226]

*Impeachment evidence:* Evidence that might adversely affect the credibility of a Commonwealth witness is *Brady* material.[227] This might include evidence of bias or interest,[228] prior inconsistent statements,[229] criminal convictions relevant to bias,[230] witness agreements with the government,[231] relationship with police,[232] prior false allegations,[233] drug or alcohol problems,[234] mental illness or impairment,[235] lack of independent recollection,[236] and so on.

---

[226] Commonwealth v. Jewett, 392 Mass. 558, 562 (1984). *See also* Commonwealth v. Keohane, 444 Mass. 563 (2005) (defendant has constitutional right to present evidence that another may have committed the crime). *Cf.* Commonwealth v. Ruell, 459 Mass. 126 (2011) (discussing evidentiary standard for admission of third-party culprit evidence); Commonwealth v. Dew, 443 Mass. 620, 627 (2005) (defendant claimed inability to present evidence of murder occurring 2 days before in same apartment building flowed from his inability to obtain grand jury transcripts regarding earlier murder).

[227] Commonwealth v. Murray, 461 Mass. 10, 22-23 (2011)(new trial ordered because impeachment evidence not disclosed). *See also* Youngblood v. West Virginia, 547 U.S. 867 (2006); Conley v. United States, 415 F.3d 183 (1st Cir. 2005) (new trial granted where "highly impeaching" FBI memorandum regarding eyewitness suppressed); Haley v. City of Boston, 677 F.Supp.2d 379 (D. Mass. 2009); Ferrara v. United States, 384 F.Supp.2d 384, 388 (D. Mass. 2005); United States v. Osorio, 929 F.2d 753 (1st Cir. 1991) (witness's background of drug possession and sales is material and exculpatory; government has duty to search for and produce it on defense request); United States v. Bagley, 473 U.S. 667, 676–77 (1985) (impeachment material falls within *Brady* rule); Giglio v. United States, 405 U.S. 150, 154–55 (1972); Commonwealth v. Williams, 455 Mass. 706 (2010); Commonwealth v. Ridge, 455 Mass. 307 (2009); Commonwealth v. Daniels, 445 Mass. 392 (2005); Commonwealth v. Sheehan, 435 Mass. 183 (2001) (mental health records impeaching and required to provide defendant a fair trial); Commonwealth v. Hill, 432 Mass. 704 (2000); Commonwealth v. Vaughn, 32 Mass. App. Ct. 435 (1992); Commonwealth v. Tucceri, 412 Mass. 401, 414 (1992); Commonwealth v. Gregory, 401 Mass. 437, 442 (1988); Commonwealth v. Neal, 392 Mass. 1, 11 (1984).; Commonwealth v. St. Germain, 381 Mass. 256, 261 n.6 (1980); Commonwealth v. Ellison, 376 Mass. 1, 22 (1978).

[228] United States v. Bagley, 473 U.S. 667, 676 (1985); Giglio v. United States, 405 U.S. 150, 154–55 (1972); Commonwealth v. Jackson, 388 Mass. 98, 112 (1983).

[229] Giles v. Maryland, 386 U.S. 66, 76–77 (1967); Conley v. United States, 415 F.3d 183, 190 (1st Cir. 2005) (suppressed FBI memorandum could have been used to show evolution of witness's testimony over time); Haley v. City of Boston, 677 F.Supp.2d 379 (D. Mass. 2009) (§1983 action for failure to disclose inconsistent witness statements); Ferrara v. United States, 384 F.Supp.2d 384, 388 (D. Mass. 2005) (witness testimony on which murder conviction was based told directly contradictory statement to police which was suppressed). Commonwealth v. Olszewski, 401 Mass. 749, 758 (1988) (lost prior witness statement containing impeachment material was exculpatory); Commonwealth v. Viera, 401 Mass. 828, 832 (1988); Commonwealth v. Connor, 392 Mass. 838, 850–51 (1984); Commonwealth v. Liebman, 388 Mass. 483, 489 (1983); In re Roche, 381 Mass. 624, 637 (1980) (prior inconsistent statements would be "highly relevant" to the case). In the case of an important witness, "the defense will properly view even relatively minor discrepancies in prior statements as exculpatory." Commonwealth v. St. Germain, 381 Mass. 256, 262 n.10 (1980). *Cf.* Commonwealth v. Vaughn, 32 Mass. App. Ct. 435, 439–42 (1992) (reversal of conviction where prosecution knew witness would change statement on direct from that made at grand jury, and prosecution failed to disclose to defense).

[230] See infra § 16.6F(2).

[231] *See* authorities cited *infra* at § 16.6F(4); U.S. v. Bagley, 473 U.S. 667 (1985); Commonwealth v. Smith, 450 Mass. 395, 409 (2008). As the Reporter's Notes to Rule 14(a)(1)(A)(viii) state, although that provision only mandates disclosure of promises and inducements to witnesses the Commonwealth intends to present at trial, the Commonwealth's constitutional obligation to disclose exculpatory evidence is not so limited. The latter would require disclosure of, for example, a promise or inducement made to a hearsay declarant who the Commonwealth does not intend to call.

[232] Commonwealth v. Madigan, 449 Mass. 702 (2007).

*Evidence of prosecution witness perjury* must be immediately disclosed and invokes the most favorable standard of "materiality," as noted immediately following.

*d. Material*

Unless the evidence is sufficiently "material," the prosecutor is not obligated to disclose exculpatory evidence. The U.S. Supreme Court has held that materiality is satisfied when "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."[237]

Identical standards of materiality are to be used by the prosecutor in deciding what exculpatory evidence to turn over and by the reviewing court in determining when nondisclosure was prejudicial enough to warrant a new trial; that is, "the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial."[238] The level of required materiality varies with the specificity of the defense request, and is set out *infra* at § 16.6A(2)(a).

*e. Prosecutors Are Instructed to Err on the Side of Disclosure*

Defining the prosecutor's duty by reference to the information's importance in the case poses a problem of clairvoyance because a prosecutor cannot fully anticipate how significant ("material") evidence will turn out to be. The U.S. Supreme Court has therefore urged "the prudent prosecutor . . . [to] resolve doubtful questions in favor of disclosure."[239] As the Supreme Judicial Court has noted, in the case of an important witness "the defense will properly view even relatively minor discrepancies in prior statements as exculpatory . . . prosecuting attorneys [should] become accustomed

[233] Commonwealth v. Reed, 444 Mass. 803, 808-809 n.6 (2005) (victim's prior allegation of sexual assault at school contained in medical records relevant and good cause was shown for their production); Commonwealth v. Bohannon, 376 Mass. 90, 95 (1978). *But see* Commonwealth v. Costa, 69 Mass. App. Ct. 823 (2007) (no error where defendant precluded from introducing prior false allegations); Commonwealth v. Savage, 51 Mass. App. Ct. 500, 503 (2001) (*Bohannon* exception is narrow).

[234] *See, e.g.,* Jackson v. United States, 377 A.2d 1151, 1154 (D.C. 1977); United States v. Mazzola, 217 F.R.D. 84 (D. Mass. 2003) (disclosure of victim's medical records concerning prescription drug use warranted). 1st Circuit Local Rule 116.2(B)(2)(g) mandates the production of "information known to the government of any mental or physical impairment of any [key government witness], that may cast doubt on the ability of that witness to testify accurately or truthfully at trial as to any relevant event."

[235] *See, e.g.,* Conley v. United States, 415 F.3d 183 (1st Cir. 2005) (eyewitness expressed uncertainty about his recollection of incident and requested hypnotism to help him truly recall); United States v. Lindstrom, 698 F.2d 1154 (11th Cir. 1983); Commonwealth v. Sheehan, 435 Mass. 183 (2001) (mental health records demonstrated child victim prone to fantasies). Commonwealth v. Caine, 366 Mass. 366, 369 (1974) (proper to impeach with evidence of mental impairment that affects witness's ability to perceive, remember, or articulate correctly).

[236] Commonwealth v. Ridge, 455 Mass. 307 (2009) (but no error because prosecutor did not know witness would testify to lack of memory).

[237] Banks v. Dretke, 540 U.S. 668 (2004), citing Kyles v. Whitley, 514 U.S. 419, 435 (1995) See also Smith v. Cain, 132 S. Ct. 627 (2012)(materiality satisfied by reasonable probability that disclosure would have produced a different trial result, where reasonable probability does not mean more likely than not, but only that the likelihood of a different result is great enough to undermine confidence in the outcome of the trial).

[238] United States v. Agurs, 427 U.S. 97 (1976). *See also* Commonwealth v. Murray, 461 Mass. 10, 20-21 (2011)(must establish prejudice); Commonwealth v. Lykus, 451 Mass. 310, 326 (2008).

[239] Kyles v. Whitley, 514 U.S. 419, 439 (1995) (quoting United States v. Agurs, 427 U.S. 97, 108 (1976)).

to disclosing all material which is even possibly exculpatory, as a prophylactic against reversible error and in order to save court time arguing about it."[240]

*f. Privileged but Exculpatory Materials*

The defendant is entitled to material, exculpatory evidence even if it is subject to a state privilege. If there is a substantial possibility that the item will be helpful to the defense, the court must follow the *Dwyer* protocol, discussed *supra* at § 16.3C

### 2. Consequences of a *Brady* Violation

*a. Consequences of Nondisclosure*

If *Brady* material is not disclosed or available at all during the trial, the defendant should move for a new trial[241] or, if the suppression was deliberate or resulted in irremediable prejudice, a dismissal of the charges barring re-prosecution.[242] (Any motion or appeal might be based on not only the due process violation, but also the state and federal confrontation clauses, on the theory that cross-examination was unconstitutionally restricted as a consequence of nondisclosure.[243])

To obtain a remedy, prejudice from the non-disclosure must be shown.[244] Evidence that merely embellishes evidence already known to the defense is not enough to require a new trial.[245] Non-disclosed material is examined collectively to assess its effect on the trial.[246]

---

[240] Commonwealth v. St. Germain, 381 Mass. 256, 262 n.10 (1980). *Accord* Commonwealth v. Daniels, 445 Mass. 392 (2005); Commonwealth v. Vaughn, 32 Mass. App. Ct. 435 (1992); Commonwealth v. Tucceri, 412 Mass. 401, 406–07 (1992); Commonwealth v. Wilson, 381 Mass. 90, 107 n.37 (1980); Commonwealth v. Baldwin, 385 Mass. 165, 173–74 (1982); Commonwealth v. Themelis, 22 Mass. App. Ct. 754, 762 (1986); Commonwealth v. Scalley, 17 Mass. App. Ct. 224, 228–29 (1983).

[241] Ordinarily this motion should be made pursuant to Mass. R. Crim. P. 30(b). *See* Commonwealth v. Murray, 461 Mass. 10 (2011)(new trial ordered for non-disclosure, citing Commonwealth v. Tucceri, 412 Mass. 401, 404-409); Commonwealth v. Earl, 356 Mass. 181 (1969). If the defendant becomes aware of nondisclosure during trial, the motion would seek a mistrial or, if a fair trial has become impossible, dismissal. *See* Commonwealth v. Green, 72 Mass. App. Ct. 903 (2008) (mistrial declared where Commonwealth did not disclose exculpatory evidence until after defense rested).

[242] Commonwealth v. Light, 394 Mass. 112, 114 (1985) (citing Commonwealth v. Cinelli, 389 Mass. 197, 210 (1983) and Commonwealth v. Manning, 373 Mass. 438, 443–444 (1977)). *See also* Commonwealth v. Laguer, 448 Mass. 585, 592 (2009); Commonwealth v. O'Day, 440 Mass. 296 (2003) (destruction of grenade simulator did not require dismissal of the indictment); Commonwealth v. Gallarelli, 399 Mass. 17, 24 & n.8 (1987) (new trial rather than dismissal is the relief normally granted, unless nondisclosure prevents the possibility of a fair trial, citing Commonwealth v. Lam Hue To, 391 Mass. 301, 310 (1984)). In United States v. Pollock, 417 F. Supp. 1332 (D. Mass. 1976), the court dismissed the case on both these grounds, finding that the government agents' destruction of investigatory notes were prejudicial and also constituted bad-faith attempts to tamper with evidence. The criteria justifying dismissal of the indictment, as opposed to an order to retry the case, are discussed *supra* at § 16.4B.

[243] The S.J.C. has raised this issue without deciding it, noting that where confrontation clause rights are abridged by nondisclosure, a new trial might be required even in the absence of prejudice. Commonwealth v. Tucceri, 412 Mass. 401, 406 n.4 (1992).

[244] Commonwealth v. Murray, 461 Mass. 10, 20-21 (2011).

[245] U. S. v. Agurs, 427 U.S. 97, 113–114 (1976); Barrett v. U.S., 965 F.2d 1184, 1189 (1st Cir. 1992).

[246] Kyles v. Whitley, 514 U.S. 419 (1995).

A reviewing court will apply a variation of the multiple standards first enunciated by the Supreme Court in *United States v. Agurs.*[247] Under *Agurs,* the degree of materiality required to mandate reversal (or, before trial, disclosure to the defense) depends on the specificity of the defendant's request and the nature of the suppressed evidence.[248] Although the Supreme Court later suggested a single standard to be applied in all cases – non-disclosure must undermine confidence in the outcome[249] -- Massachusetts has explicitly chosen to utilize the following hierarchy because it provides more safeguards to the defendant:[250]

1. *If the government knew or should have known that it was presenting perjured testimony,* the evidence is sufficiently material to require reversal when there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury"[251] or, in later Supreme Court elaboration, the nondisclosure was not harmless beyond a reasonable doubt.[252] This prosecutorial obligation will ordinarily arise during testimony rather than in pretrial discovery. Because the most favorable test of materiality is applied in this situation, counsel should note Massachusetts cases that find a prosecutorial obligation to correct false testimony even when there is only a substantial possibility of perjury,[253] or in exceptional circumstances no perjury at all but merely testimony unintentionally giving the jury a false impression.[254]

---

[247] 427 U.S. 97 (1976).

[248] *See* United States v. Agurs, 427 U.S. 97, 106 (1976) ("The test of materiality . . . [when specific information has been requested] is not necessarily the same as in a case in which no such request has been made"); Commonwealth v. Laguer, 448 Mass. 585, 595 n.27 (2009); Commonwealth v. Daniels, 445 Mass. 392 (2005); Commonwealth v. Tucceri, 412 Mass. 401 (1992); Commonwealth v. Neal, 392 Mass. 1, 11 n.10 (1984) (standard of materiality differs depending on specificity of request); Reporter's Notes to Mass. R. Crim. P. 14(a)(1)(A)(iii) (magnitude of error in part a function of the specificity of the motion, citing cases with insufficient specificity).

[249] In United States v. Bagley, 473 U.S. 667, 682 (1985), the court stated: "We find the *Strickland* [*v. Washington*] formulation of the *Agurs* test for materiality sufficiently flexible to cover the 'no request,' 'general request,' and 'specific request' cases of prosecutorial failure to disclose evidence favorable to the accused: the evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."

*See also* Kyles v. Whitley, 514 U.S. 419 (1995); Wood v. Bartholomew, 516 U.S. 1 (1995), applying the *Bagley* test.

[250] Commonwealth v. Laguer, 448 Mass. 585, 594 n. 25 (2009) ("we have declined as a matter of state law to adopt the single *Bagley* standard"); Commonwealth v. Tucceri, 412 Mass. 401, 407 (1992); Commonwealth v. Gallarelli, 399 Mass. 17, 21 n.5 (1987).

[251] Commonwealth v. Tucceri, 412 Mass. 401, 405 n.3 (1992) (quoting United States v. Agurs, 427 U.S. 97, 103 (1976); Mooney v. Holohan, 294 U.S. 103 (1935); United States v. Kattar, 840 F.2d 118, 127–29 (1st Cir. 1988); Zeigler v. Callahan, 659 F.2d 254 (1st Cir. 1981); Commonwealth v. Collins, 386 Mass. 1 (1982)). *See also* Moore v. Illinois, 408 U.S. 786, 797–98 (1972) (dictum); Giglio v. United States, 405 U.S. 150, 154 (1972); Napue v. Illinois, 360 U.S. 264, 271 (1959) (due process requires reversal where prosecutor did not correct known false testimony).

[252] United States v. Bagley, 473 U.S. 667, 679–80 (1985).

[253] Commonwealth v. Connor, 392 Mass. 838, 851 (1984).

[254] Commonwealth v. Gilday, 367 Mass. 474, 176–77 (1980) (although witness may not have been aware of government's promise to his lawyer, prosecutor should have corrected false impression from witness's testimony that there was no deal with the government). *But see* Commonwealth v. McLeod, 394 Mass. 727, 743–44 (1985) (variance does not demonstrate *Brady* violation); Commonwealth v. Mercado, 383 Mass. 520, 525–26 (1981) (no error because officer told truth as he knew it, and defendant aware of the additional contrary evidence); Commonwealth v. Daigle, 379 Mass. 541 (1980) (because neither witness nor prosecutor knew that

2. If the defendant made a request for the specific evidence (or, under Massachusetts cases, if the suppression of evidence was deliberate),[255] reversal is required if "a substantial basis for claiming materiality exists"[256] or the evidence might have affected the outcome of the trial.[257] The reviewing court must set aside the verdict unless it is "sure that the error did not influence the jury, or had but very slight effect."[258]

A specific request is one that provides the Commonwealth with notice of the defendant's interest in a particular piece of evidence.[259]

3. *If the defendant made no request or merely a general request for "exculpatory material,"* Massachusetts requires a new trial if "there is a substantial risk that the jury would have reached a different conclusion if the evidence had been admitted at trial." This test is satisfied if the evidence "would have been a real factor in the jury's deliberations," or if the nondisclosure "likely deprived the defendant of an otherwise available, substantial ground of defense."[260] In the no request/general request

---

witness's statement regarding no pending cases was false, higher materiality threshold applies, which defense failed to demonstrate).

[255] *See* Commonwealth v. Daigle, 379 Mass. 541, 547 (1980); Commonwealth v. Gilday, 367 Mass. 474, 486–89 (1975).

[256] "[I]f a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge. When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." United States v. Agurs, 427 U.S. 97, 106 (1976). *Accord* Commonwealth v. Williams, 455 Mass. 706, 721 n. 12 (2010) (a defendant need only demonstrate that a substantial basis exists for claiming prejudice from the non-disclosure) (citing Commonwealth v. Tucceri, 412 Mass. 401, 412 (1992); Commonwealth v. Gregory, 401 Mass. 437, 442 (1988]; Commonwealth v. Gallarelli, 399 Mass. 17, 20, 22 (1987); Commonwealth v. Wilson, 381 Mass. 90, 108–09 (1980); Commonwealth v. Saucy, 17 Mass. App. Ct. 471, 472 (1984). The defendant bears the burden of persuasion on the issue of prejudice. Commonwealth v. Schand, 420 Mass. 783, 788 & n.1 (1995).

Presumably, use of this formulation is premised on a single definition of materiality which need not be fully satisfied — i.e., the one applied in *Agurs* to the "no request" situation, "sufficient to raise a reasonable doubt which did not otherwise exist" — but *Agurs* and cases since also speak in terms of the different definitions of materiality to be applied in the different situations. While the effect is the same, cases since *Agurs* are rife with confusion in their use of the word *materiality.*

[257] United States v. Agurs, 427 U.S. 97, 104–06 (1973).

[258] Commonwealth v. Gallarelli, 399 Mass. 17, 23 (1987) (citing Commonwealth v. Ellison, 376 Mass. 1, 24–25 (1978)). *See also* Commonwealth v. Daye, 411 Mass. 719, 729–30 (1992); Commonwealth v. Collins, 386 Mass. 1, 9 (1982); Commonwealth v. Gilday, 382 Mass. 166, 178 (1980) (applying harmless error test to the situation of exculpatory evidence which was specifically requested).

[259] Commonwealth v. Gallarelli, 399 Mass. 17, 21–22 (1987) (citing Commonwealth v. Wilson, 381 Mass. 90, 109 (1980)). In *Gallarelli,* a request for all "police reports and scientific reports" was held sufficiently specific to cover a laboratory report showing an absence of blood on the defendant's knife. The court distinguished the request in Commonwealth v. Jackson, 388 Mass. 98 (1983), for "police reports" as not sufficient to specifically identify police reports of another, apparently unrelated case, but *Jackson*'s finding at 110 that "broad categories" are not specific should caution counsel to individually identify any item of exculpatory evidence which may be suspected to exist.

A request which merely recited the language of Mass. R. Crim. 14 is a general request. Commonwealth v. Iquabita, 69 Mass. App. Ct. 295, 302 (2007). *See also* Commonwealth v. Caliot, 454 Mass. 245, 262 n.11 (2009) (where accused has made a request for evidence sufficiently specific as to put the prosecution on notice as to what the defendant desires, the evidence must be disclosed even if it provides only a substantial basis for claiming materiality); Commonwealth v. Daniels, 445 Mass. 392, 405 n. 23 (2005) Commonwealth v. Brown, 57 Mass. App. Ct. 852, 857 (2003) (defendant's request for police reports not specific enough to place prosecution on notice that inventory report was being sought).

[260] Commonwealth v. Tucceri, 412 Mass. 401, 413 (1992). The test is identical to the common law standard for granting a new trial or for measuring the consequences of ineffective assistance of counsel. *Tucceri,*

situation, *Agurs* had required the defendant to show that the evidence would have created a reasonable doubt,[261] but the Supreme Judicial Court abandoned that test in 1992 as too restrictive.[262]

In determining the materiality of the evidence, the reviewing court must make an independent assessment of the impact disclosure would have had on the trial.[263]

*b. Consequences of Delayed Disclosure of Brady Material*

If *Brady* material is disclosed late but in time for use at trial, the same three levels of materiality detailed above will be applied (see discussion above),[264] but "it is the consequences of the delay that matter, not the likely impact of the non-disclosed evidence."[265]

Although it is easier for a court to find no *Brady* violation from delay because the likelihood of prejudice is less,[266] the Supreme Judicial Court has recognized that late disclosure can severely

---

*supra,* 412 Mass. at 412–13. The S.J.C. noted that the standard is based on state common law and is more favorable than the federal standard (*Tucceri, supra,* 412 Mass. at 413 n.11), and stressed that the question is how the nondisclosed evidence would have affected the jury, not the judge. *Tucceri, supra,* 412 Mass. at 411. *See* Commonwealth v. Bennett, 43 Mass. App. Ct. 154, 161 (1997) ("[i]t is not a question of the weight a judge would assign to [the alleged victim's suppressed exculpatory statement]; rather the jury must be taken as the reagent"). In first-degree murder cases, the test under G.L. c. 278, § 33E, if there has been no request or a general request, is whether there has been a substantial likelihood of a miscarriage of justice. Commonwealth v. Simmons, 417 Mass. 60, 73 (1994).

[261] United States v. Agurs, 427 U.S. 97, 106, 112 (1976). *See also* Commonwealth v. Iquabita, 69 Mass. App. Ct. 295 (2007) (non-disclosure of potentially impeaching videotape of victim at wedding did not require new trial where it would not have created a reasonable doubt that did not otherwise exist).

[262] Commonwealth v. Tucceri, 412 Mass. 401 (1992). Prior to 1992 the S.J.C. roughly used the *Agurs* test, but in language so varied that the standard became increasingly unclear. *Compare* Commonwealth v. Gregory, 401 Mass. 437, 442 (1988); Commonwealth v. Liebman, 388 Mass. 483, 487 n.4, 489 (1983); Commonwealth v. Wilson, 381 Mass. 90, 107–09 (1980); and Commonwealth v. Ellison, 376 Mass. 1, 23 n.13 (1978). *But see* Commonwealth v. Iquabita, 69 Mass. App. Ct. 295, 302-303 (2007) (evidence would not have created reasonable doubt that did not otherwise exist); Commonwealth v. Lay, 63 Mass. App. Ct. 27, 34 (2005) (test is whether undisclosed evidence would have created a reasonable doubt that did not otherwise exist).

[263] Napue v. Illinois, 360 U.S. 264, 271–72 (1959); Commonwealth v. Liebman, 388 Mass. 483, 484 (1983); Commonwealth v. Collins, 386 Mass. 1, 10 (1982).

[264] If no specific request was made, would timely disclosure have allowed the defendant to create a reasonable doubt; if a specific request was lodged, would the defendant have been able to present the case in such a manner as to create "a substantial basis for claiming materiality exists"? Commonwealth v. Gregory, 401 Mass. 437, 442 (1988).

[265] Commonwealth v. Molina, 454 Mass. 232, 236 (2009) (where there was a delay in disclosing potentially exculpatory evidence that was part of defendant's general discovery request, we ask whether the prosecution's disclosure was sufficiently timely to allow the defendant to make effective use of the evidence); Commonwealth v. Felder, 455 Mass. 359, 367 (2009); Commonwealth v. Green, 72 Mass. App. Ct. 903 (2008); Commonwealth v. Baldwin, 385 Mass. 165, 175 (1982); Commonwealth v. Wilson, 381 Mass. 90, 114 (1980). Under these cases, when there was no specific request for exculpatory evidence, a mistrial is *required* if timely disclosure would have enabled the defendant to create a reasonable doubt that could not otherwise be shown, but the trial judge *may* grant a mistrial on a far lesser showing of prejudice. *Baldwin, supra,* 385 Mass. at 175, 177–78; *Wilson, supra,* 381 Mass. at 114. *See also* Commonwealth v. Conti, 71 Mass. App. Ct. 1101 (2007)(when disclosure delayed, mistrial justified only on "showing of prejudice and demonstration of 'how the granting of a new trial would substantially remedy such prejudice," quoting Commonwealth v.. Cundriff, 382 Mass. 137, 151 (1980); Commonwealth v. Lapka, 13 Mass. App. Ct. 24, 29–30 (1982). In federal cases, the court asks whether the defendant demonstrated that the delay prevented defense counsel from using the disclosed material effectively in preparing and presenting the defendant's case. United States v. Van Anh, 523 F.3d 43, 51 (1st Cir. 2008)

prejudice the defense. In one case the court found that the prosecutor's "late, piecemeal, and incomplete disclosures forced on defense counsel the necessity of making difficult tactical decisions quickly in the heat of trial. . . . In retrospect, it may be thought that counsel did not use to maximum advantage those parts of the story he did finally secure out of the prosecutor's possession. But the defendant should not be held to a strict standard in order to patch over the prosecution's conduct."[267] In other cases the court has underscored that material and exculpatory evidence must be disclosed "at such a time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case."[268] Disclosure as soon as possible following indictment is called for by a Supreme Judicial Court rule and the ABA Standards.[269]

When the delayed disclosure of exculpatory evidence has hindered the defense, counsel should consider seeking a dismissal, a mistrial that would ordinarily allow retrial, recalling witnesses, or a continuance to prepare; moving for a continuance might be helpful in preserving the issue.[270] The prejudice required for obtaining a mistrial or dismissal is similar to that applied when the prosecution delays providing non-*Brady,* inculpatory evidence subject to a discovery order,[271] and is more fully discussed *supra* at § 16.4B.

### 16.6B. EVIDENCE LOST OR DESTROYED BY POLICE

The following discussion concerns remedies for destruction or loss of evidence. However, if alert to the possibility that significant evidence may be in jeopardy, counsel should take preventive action by immediately filing a Motion to Preserve Evidence. This might be done as early as the arraignment.[272]

---

[266] *See, e.g.,* United States v. Osorio, 929 F.2d 753 (1st Cir. 1991); Commonwealth v. Sullivan, 410 Mass. 521, 530 (1991) (curative instruction sufficient because it placed blame for unfulfilled promise in defense opening on prosecution); Commonwealth v. Adrey, 376 Mass. 747, 755 (1978) ("ultimate and effective presentation of the evidence to the jury cured any error that might otherwise have existed"); Commonwealth v. Marple, 26 Mass. App. Ct. 150, 156–57 (1988); Commonwealth v. Pasciuti, 12 Mass. App. Ct. 833, 839 (1981) (use of impeachment evidence at trial cured delayed disclosure).

[267] Commonwealth v. Ellison, 376 Mass. 1, 25–27 (1978). *See also* Commonwealth v. Eneh, 76 Mass. App. Ct. 672 (2010) (delayed disclosure of bank records showing defendant had $14,000 in bank account was prejudicial and required new trial where defense counsel had portrayed defendant as penniless and homeless in opening statement);

[268] Commonwealth v. Molina, 454 Mass. 232, 236 (2009); Commonwealth v. Baldwin, 385 Mass. 165, 175 (1982); Commonwealth v. Wilson, 381 Mass. 90, 107 (1980) (quoting United States v. Pollack, 534 F.2d 964, 973 (D.C. Cir. 1976), *cert. denied,* 429 U.S. 924 (1976)); Commonwealth v. Adrey, 376 Mass. 747, 755 (1978); Commonwealth v. Themelis, 22 Mass. App. Ct. 754, 762 (1986). *See also* United States v. Agurs, 427 U.S. 97, 108 (1976) ("the prudent prosecutor will resolve doubtful questions in favor of disclosure"); Commonwealth v. Vaughn, 32 Mass. App. Ct. 435, 440–42 (1992) (failure to disclose crucial change in Commonwealth witness's testimony prejudicially denied defense opportunity to obtain expert testimony); Commonwealth v. Gagliardi, 29 Mass. App. Ct. 225, 228 (1990) (defendant should have discovery in advance of trial, not "dribbled into the trial at the prosecution's discretion"); Commonwealth v. Lam Hue To, 391 Mass. 301, 307–10 (1984) (S.J.C. remand for finding whether irreparable harm to defense from delayed disclosure).

[269] S.J.C. Rule 3:07 at 3.8(d); ABA Standards Relating to Discovery and Procedure before Trial, Standards 11-2.1(c), 11-2.2(a) (1982); ABA Standards Relating to the Prosecution Function, Standard 3-3.11(a) (1982).

[270] These choices are discussed from legal and tactical viewpoints *supra* at § 16.4B.

[271] Commonwealth v. Baldwin, 385 Mass. 165, 175 (1982) ("the distinction between inculpatory and exculpatory evidence is not significant where the issue is delayed disclosure, as opposed to failure to disclose").

[272] Regarding motions to preserve evidence in third-party hands, see *supra* § 16.3B.

### 1. The Criterion for a Due Process Violation

In some cases the defendant may be deprived of exculpatory evidence not simply because of prosecutorial nondisclosure but because the Commonwealth lost or failed to preserve evidence. A due process test has been applied to this situation, which differs significantly from the *Brady/Agurs* criterion detailed above: First, the threshold question: has the defendant sufficiently demonstrated that lost or destroyed evidence was potentially exculpatory? If so, the second step is for the court to weigh the culpability of the Commonwealth, the materiality of the evidence, and the potential prejudice to the defendant.[273] Although there had been some conflict in the cases, in that some cases conflated the two steps into a single balancing test involving all factors,[274] the SJC rejected that approach in 2010, stating that if the defendant does not demonstrate that the evidence was potentially exculpatory, the court will not reach the second step balancing test.[275] (Bad faith loss or destruction of evidence may justify a remedy on other grounds, however.[276]) In applying this test, the following points should be underscored.

### 2. Defendant's threshold burden: "reasonable possibility" that evidence is exculpatory

To obtain relief, a defendant must show "a 'reasonable possibility, based on concrete evidence rather than a fertile imagination,' that access to the [evidence] would have produced evidence favorable to his cause."[277]

---

However, because a defendant might be *harmed* by preservation of some evidence, "motions to preserve should be filed when it makes tactical sense to do so." Bennett, "Prosecutorial Misconduct: How to Protect Your Client and Strategies to Fight It When It Rears Its Ugly Head in Your Case," *CPCS Annual Training Conference Materials* at 3 (Nov. 14, 1997). Attorney Bennett continues:

> Among the things which can be lost or destroyed early on in the proceedings are: turret tapes; diagrams, photographs; rough notes and diagrams made out by police officers and detectives, as well as the identity and description of witnesses who were spoken to by police officers but who were not listed in official reports. . . . Where physical evidence has been obtained in a case, counsel should move that it be preserved and that the Commonwealth be ordered to refrain from destructive forensic testing of any evidence without notice to the accused.

Bennett, *supra,* at 3.

[273] Commonwealth v. Williams, 455 Mass. 706, 716 (2010); Commonwealth v. Clemente, 452 Mass. 309 (2008); Commonwealth v. Laguer, 448 Mass. 585, 593 (2007); Commonwealth v. Dinkins, 440 Mass. 715, 717 (2004); Commonwealth v. Cintron, 438 Mass. 799, 784 (2003); Commonwealth v. Castro, 438 Mass. 160, 167-168 (2002); Commonwealth v. DiBennedetto, 427 Mass. 414, 419 (1998); Commonwealth v. Sasville, 35 Mass. App. Ct. 15, 19 (1993) (dismissal of indictment warranted); Commonwealth v. Henderson, 411 Mass. 309, 310 (1991) (dismissal of indictment warranted, citing Commonwealth v. Olszewski, 401 Mass. 749, 754–55 (1988)); Commonwealth v. Otsuki, 411 Mass. 218, 230–31 (1991); Commonwealth v. Buckley, 410 Mass. 209, 218 (1991); Commonwealth v. Games, 403 Mass. 258, 276–78 (1988); Commonwealth v. Shipps, 399 Mass. 820, 835 (1987); Commonwealth v. Cameron, 25 Mass. App. Ct. 538, 547 (1988); Commonwealth v. Fidler, 23 Mass. App. Ct. 506, 516 (1987); Commonwealth v. Walker, 14 Mass. App. Ct. 544, 546–49 (1982). A similar test is used by the First Circuit. *See* United States v. Arra, 630 F.2d 836 (1st Cir. 1980).

[274] Commonwealth v. Willie, 400 Mass. 427 (1987); Commonwealth v. Harwood, 432 Mass. 290, 295 (2000); Commonwealth v. Charles, 397 Mass. 1 (1986).

[275] Commonwealth v. Williams, 455 Mass. 706, 718-19 (2010)

[276] Commonwealth v. Williams, 455 Mass. 706, 718 (2010), citing Commonwealth v. Gliniewicz, 398 Mass. 744, 747-49 (1986).

[277] Commonwealth v. Williams, 455 Mass. 706, 716 (2010)(citing Commonwealth v. Olszewski, 401 Mass. 749, 753–54 (1988) and Commonwealth v. Neal, 392 Mass. 1, 12 (1984)). *See also* Commonwealth v.

The *Brady* line of cases, examined *supra* at § 16.6A(1), define what sort of evidence is exculpatory. However, unlike the nondisclosure situation, when the evidence no longer exists, the defendant may not be able to establish its exculpatory nature. For example, an erased booking videotape would have been probative evidence in an "OUI" case, but it is impossible to demonstrate which side it would benefit. Therefore, the defendant need only show "a reasonable possibility" that the evidence would have been exculpatory.[278] Even under this relaxed standard, however, it has been held that breathalyzer ampoules that were destroyed after the police obtained a reading were too unlikely to exculpate the defendant to entitle him to relief – a not uncommon conclusion in cases of destroyed evidence.[279]

### 3. Government Culpability Is Relevant

This contrasts with the *Brady* nondisclosure situation, where good or bad faith by the government is irrelevant. In assessing government culpability, the courts have provided certain guidelines.

---

Clemente, 452 Mass. 295 (2008); Olszewski v. Spencer, 369 F.Supp.2d 113 (D. Mass. 2005); Commonwealth v. Henderson, 411 Mass. 309, 310–11 (1991) (police notes of victim's description of assailant destroyed; dismissal warranted); Commonwealth v. Otsuki, 411 Mass. 218, 231 (1991); Commonwealth v. Phoenix, 409 Mass. 408, 414 (1991); Commonwealth v. Cameron, 25 Mass. App. Ct. 538 (1988) (in "OUI" case, lost booking videotape was potentially exculpatory so new trial required). Whether the evidence was potentially exculpatory depends on the theory of defense which the defendant claims was undermined by its loss or destruction. Commonwealth v. Mitchell, 38 Mass. App. Ct. 184, 190 (1995). *Cf.* United States v. Valenzuela-Bernal, 458 U.S. 858, 872–73 (1982) (to show due process violation or compulsory process violation from deportation of defense witness, must show materiality, but lesser showing suffices because the "defendant cannot be expected to render a detailed description of their lost testimony").

[278] Commonwealth v. Williams, 455 Mass. 706, 714-15 (2010), affirming the standard enunciated in Commonwealth v. Neal, 392 Mass. 1, 12 (1984).

[279] California v. Trombetta, 467 U.S. 479, 488–90 (1984) (duty to preserve limited to evidence whose exculpatory value is apparent); Commonwealth v. Neal, 392 Mass. 1, 10, 12 (1984) (police need not retain ampoules under due process, even though small possibility ampoules might impeach accuracy of breathalyzer). *Cf.* Commonwealth v. Lopez, 433 Mass. 406 (2001)(although Commonwealth was negligent in failing to prevent the DPW from destroying defendant's truck, which was subject to a preservation order, no reasonable possibility that it would have produced evidence favorable to defense); Commonwealth v. Simmarano, 50 Mass. App. Ct. 312 (2000)(no showing that destroyed 911 victim call tape and booking videotape were potentially exculpatory); Commonwealth v. McIntyre, 430 Mass. 529, 536-38 (1999)(not a reasonable possibility that destruction of car, the murder scene, would have yielded exculpatory evidence); Commonwealth v. Hunter, 426 Mass. 715, 718–19 (1998) (no prejudice to defendant from inadvertent destruction of fingerprint evidence where defendant had been furnished photos of fingerprint, and expert testimony was based on photos), citing Commonwealth v. Buckley, 410 Mass. 209, 218–19 (1991) (similar issue involving writing) and Commonwealth v. Phoenix, 409 Mass. 408, 415–17 (1991); Commonwealth v. Nom, 426 Mass. 152, 159 (1997) (in absence of independent evidence that defendant was intoxicated when telephoned police on evening of crime, no showing of reasonable possibility that tape recording of call, "taped over" by police, would have been favorable to defendant); United States v. Corpus, 882 F.2d 546 (1991) (not violation to destroy marijuana residue after field tests repeatedly proved positive); Commonwealth v. Otsuki, 411 Mass. 218, 232 (1991) (no prejudice to defendant from loss of bullet fragments, because other evidence overwhelming); Commonwealth v. Capparelli, 29 Mass. App. Ct. 926, 928 (rescript opinion) (1990) (no prejudice because other evidence was overwhelming); Commonwealth v. Monteiro, 396 Mass. 123, 129 (19851 (no obligation to turn over everything government learns); Commonwealth v. Walker, 14 Mass. App. Ct. 544, 548–49 (1982) (although fingerprints or lack of them is clearly material, and lost beer cans deprived defendant of that evidence, no prejudice because case so strong).

Prosecutors and police have a duty to preserve and present exculpatory evidence.[280] Although ABA standards require the parties to inform opposing counsel if relevant evidence will be transferred out of its possession, or destroyed through testing or otherwise,[281] and any such procedure should be photographed step-by-step,[282] the Supreme Court has held that no obligation of preservation attaches unless it is apparent that the evidence has exculpatory value.[283] It is unclear whether and when the government has an obligation to preserve an object in other than its natural state.[284] In any event, it is good practice to notify the prosecution of the defense interest in preserving or testing physical evidence.[285] For fuller discussion of the problem of government destruction of samples, see *supra* § 12.2D.

If the government did not fulfill the above obligation and lost or destroyed evidence, its culpability must be examined. Negligence and inadvertence are less culpable than bad faith but are nevertheless culpable and to be counted in the balancing test.[286] When the Commonwealth cannot

[280] Commonwealth v. Sasville, 35 Mass. App. Ct. 15, 19 (1993); United States v. Pollock, 417 F. Supp. 1332, 1345 (D. Mass. 1976) (duty to disclose implies duty to preserve); Commonwealth v. Cameron, 25 Mass. App. Ct. 538, 545–46 (1988); Commonwealth v. Olszewski, 401 Mass. 749, 754 (1988); Commonwealth v. Walker, 14 Mass. App. Ct. 544, 547 (1982) (before a request for discovery is made, the duty of disclosure is operative as a duty of preservation). *Cf.* Commonwealth v. Simmarano, 50 Mass. App. Ct. 312, 317-318 n. 6 (2000)(although no relief granted because destroyed 911 tapes were not potentially exculpatory, by its policy of destroying tapes after 90 days the Commonwealth is taking a risk of dismissal or other sanctions, and when criminal charges result, the district attorney should see that "all pertinent physical evidence in the hands of police…is preserved pending trial"); Commonwealth v. Santiago, 30 Mass. App. Ct. 207, 221–22, n.5 (1991) (advising that in taking notes, police officers should at least note exculpatory statements or the fact that none were made). There is, however, no duty to search for and then preserve potentially exculpatory evidence in third party hands. Commonwealth v. Richardson, 49 Mass. App. Ct. 82 (2000).

[281] ABA Standards for Criminal Justice: Discovery and Procedure Before Trial, Standard 11-3.2 (3rd edition).

[282] Commonwealth v. Phoenix, 409 Mass. 408, 413 (1991). *But see* Commonwealth v. Gordon, 422 Mass. 816, 836–37 (1996) (Commonwealth notified defendants that blood spatter evidence might be destroyed in testing, and invited defense to have their expert witness observe the testing, but defendants declined; Commonwealth's failure to photograph the process "has minimal significance").

[283] California v. Trombetta, 467 U.S. 479, 488–90 (1984). *Accord* Commonwealth v. Neal, 392 Mass. 1, 12 (1984). *But see* Commonwealth v. Gomes, 403 Mass. 258, 276–78 (1988) (failure to photograph state's electrophoretic tests on bloodstains was somewhat culpable but totality of factors does not require new trial); Commonwealth v. Shipps, 399 Mass. 820, 836 (1987) (better practice would have been full documentation and photographing of test that destroyed evidence, since no defense attorney to notify).

[284] In Commonwealth v. Willie, 400 Mass. 427, 431 n.7 (1987), the court explicitly did not decide whether the obligation to preserve evidence includes a duty to preserve it in other than natural state, such as freezing or drying. It noted that Commonwealth v. Jewett, 17 Mass. App. Ct. 354, 360 (1984), had found no duty to take extraordinary measures in the absence of a specific request or a showing that the Commonwealth should have known possibly exculpatory evidence would be lost. *See also* Commonwealth v. Sasville, 35 Mass. App. Ct. 15, 19 at n.3 (1993) (government's duty to preserve, but not to conduct potentially exculpatory blood test on, aborted fetus of alleged rape victim); Commonwealth v. Richenburg, 401 Mass. 663, 669 (1988) (failure to conduct blood typing tests is not suppression of evidence); Commonwealth v. Lewinski, 367 Mass. 889, 899–900 (1975) (failure to type sperm in homicide case was not negligent or sufficiently likely to be exculpatory to fall within *Brady* doctrine).

[285] *See, e.g.,* Commonwealth v. Richenburg, 401 Mass. 663, 668–69 (1988) (slides not prematurely discarded when timely request by defendant would have provided him opportunity for own analysis); Commonwealth v. Comes, 403 Mass. 258, 276–78 (1988) (defense failure to request preservation was one factor).

[286] Commonwealth v. Sasville, 35 Mass. App. Ct. 15, 23–24 (1993) (prosecutor's order approving destruction of alleged rape victim's aborted fetus without conducting blood tests, on the day that charges against

explain what happened to evidence that was in its possession, that failure will be chargeable as at least negligence[287] but may be pegged at a higher level of culpability.[288]

Finally, there is the question of what weight the government's culpability should be given. As noted above, bad faith counts more heavily than negligence or inadvertence. But however blatant the conduct, it is only one factor to be weighed along with materiality and prejudice. The Supreme Judicial Court has definitively rejected any rule that a due process violation *must* be found whenever the Commonwealth fails to show earnest efforts to preserve the evidence or otherwise prove its good faith.[289] However, the Court has also noted that "where the Commonwealth has acted in bad faith or recklessly….the defendant may be independently entitled to a remedy" even absent any showing the evidence was potentially exculpatory or its loss prejudicial.[290]

Conversely, the Supreme Court has decided that no federal due process violation occurs from lost evidence in the absence of bad faith,[291] but the Supreme Judicial Court regards bad faith as simply one factor to be considered.[292] The court has noted that an unfair trial may result even when the prosecution loses the evidence despite good faith,[293] and there seems no reason that insight should be

---

the defendant were brought, showed gross negligence and came "perilously close" to supporting inference of bad faith); Commonwealth v. Olszewski, 401 Mass. 749, 753, 757 n.7 (1988) ("inept and bungling performance of the police" chargeable to prosecutor); Commonwealth v. Cameron, 25 Mass. App. Ct. 538, 548 (1988). In *Olszewski, supra,* 401 Mass. at 758, it did not matter that defense counsel had agreed to destruction or release of the evidence since it was based on the Commonwealth's misleading representation that tests were completed.

[287] Commonwealth v. Phoenix, 409 Mass. 408, 415 (1991); Commonwealth v. Cameron, *supra,* at 548 (no explanation of why booking videotape was blank).

[288] In Commonwealth v. Holman, 27 Mass. App. Ct. 830 (1989), the police lost a videotape of an "OUI" defendant. The court stated that in the future it would be less inclined to find negligence from such circumstances, but might find a higher level of culpability and, where prejudice existed, dismiss the charges. *Holman, supra*, 27 Mass. App. Ct. at 833.

[289] Commonwealth v. Olszewski, 401 Mass. 749, 755 (1988); Commonwealth v. Willie, 400 Mass. 427, 432–33 (1987) (semen stains not preserved on part of sheet despite defense request). *See also* Commonwealth v. Rodriguez, 50 Mass. App. Ct. 405 (2000). These cases reject the more stringent standard enunciated in United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971).

[290] Commonwealth v. Williams, 455 Mass. 706, 718 (2010), citing Commonwealth v. Gliniewicz, 398 Mass. 744, 747-49 (1986). In Commonwealth v. Olszewski, 401 Mass. 749, 754 n.2 (1988), the court stated that "it would seem that [in another case] culpability, in the sense of bad faith destruction or falsification of evidence, could present an independent ground for remedial action," citing Miller v. Pate, 386 U.S. 1 (1967); Commonwealth v. Willie, 400 Mass. 427, 434 (1987) (Liacos, J., concurring in part and dissenting in part). *See also* prophylactic rule of Commonwealth v. Manning, 373 Mass. 438, 444 (1977) (dismissal may be justified by egregious government misconduct), and other cases cited *supra* in notes 135–137.

[291] Illinois v. Fisher, 124 S. Ct. 1200 (2004)(*per curiam)*(no due process violation where potentially exculpatory evidence destroyed by police in good faith and according to departmental procedure after eleven years); Arizona v. Youngblood, 488 U.S. 51 (1988)(no violation where state failed to preserve semen samples; "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law"). *See also* United States v. Arache, 946 F.2d 129 (1st Cir. 1991).

[292] Commonwealth v. Henderson, 411 Mass. 309, 311 (1991) (Mass. Const. due process provision stricter than federal one; good faith not dispositive) (citing Commonwealth v. Phoenix, 409 Mass. 408, 412 n.1 (1991)).

[293] *Compare* Commonwealth v. Olszewski, 401 Mass. 749. 754 n.2 (1988) ("the court did not consider in [*Commonwealth v.*] *Charles* that, apart from the Commonwealth's culpability, a defendant still may be unable to receive his constitutionally guaranteed right to a fair trial") *with* Commonwealth v. Walker, 14 Mass. App. Ct. 544, 546 (1982) (noting that the Supreme Court does not consider evidence suppressed in the *Brady* sense if the government satisfactorily explains why it is unable to produce the evidence).

restricted to the *Brady* nondisclosure situation. Moreover, a separate line of authority provides remedies for evidence lost by clerks in good faith.[294]

### 4. The Remedy

If a balancing of the factors indicates a due process violation, fashioning a fair remedy may be difficult. The common *Brady* remedy — a new trial — may not suffice because important evidence no longer exists. As the U.S. Supreme Court has noted, "when evidence has been destroyed in violation of the Constitution, the court must choose between barring further prosecution or suppressing . . . the State's most probative evidence."[295]

The destruction or loss of potentially exculpatory evidence will require a dismissal when no fair trial can be produced[296] or when government misconduct is so egregious that dismissal should be applied as a prophylactic sanction.[297] In many cases, however, the courts have attempted to eliminate the prejudice to the defense by suppressing government evidence that might have been rebutted by the lost items.[298] At a minimum, the defendant may also be entitled to an instruction that the jury may draw an adverse inference from the Commonwealth's loss of material evidence.[299]

---

[294] *Compare* Commonwealth v. Marks, 12 Mass. App. Ct. 511, 518–22 (1981) (new trial ordered because material exhibits were lost during jury deliberations) *with* Commonwealth v. Callahan, 386 Mass. 784, 792–93 (1982) (no error in allowing criminalist to testify concerning exhibit from first trial that had been lost by clerk before second trial).

Rules regarding the disposal of exhibits may be relevant in this context. See G.L. c. 233, § 79 (return of hospital records), § 79J (return of business records); c. 266, § 48 (stolen goods returned on conviction); Super. Ct. R. 14 (unclaimed exhibits); Dist. Ct. Bulletin No. 3-84 (Nov. 26, 1984) (regarding the former do novo system, in first tier, clerk's custody ends at appeal to de novo session; in second tier, exhibits kept by clerk until appeal exhausted).

[295] California v. Trombetta, 467 U.S. 479, 486–87 (1984).

[296] *See, e.g.* Commonwealth v. Sasville, 35 Mass. App. Ct. 15, 26–28 (1993) (indictment dismissed because destruction of alleged rape victim's aborted fetus, before blood tests could be performed to establish or negate defendant's paternity, deprived him of sole means to impeach alleged victim's credibility); Commonwealth v. Henderson, 411 Mass. 309 (1991) (indictment appropriately dismissed when victim's description of her assailant was lost and indictment occurred two years later); United States v. Pollock, 417 F. Supp. 1332, 1348 (D. Mass. 1976) (where government agent's notes were destroyed that might have corroborated drug defendant's claim that he was a government agent, no lesser sanction than dismissal would be adequate). *Compare* Commonwealth v. Waters, 420 Mass. 276 (1995) (no relief for failure to preserve police turret tape where police were at most negligent, defendant had not established reasonable possibility that the tape would have produced favorable evidence, trial court mitigated harm by permitting defendant to depose numerous witnesses, and there was overwhelming evidence of defendant's guilt).

[297] Commonwealth v. Willie, 400 Mass. 427, 434 (1987); Commonwealth v. Holman, 27 Mass. App. Ct. 830, 831, 833 (1989) (in future cases of lost "OUI" videotapes court may dismiss the case). *See* full list of authorities *supra* at§ 16.4B.

[298] *See, e.g.,* Commonwealth v. Harwood, 432 Mass. 290 (2000)(upholding suppression rather than requested dismissal of lost, contested letter that deprived defendant of handwriting analysis); Commonwealth v. Olszewski, 401 Mass. 749 (1988) (because government loss of alleged murder weapon deprived defendants of potential fingerprint evidence, proper remedy should be exclusion of all testimony tying it to defendants); Commonwealth v. Gliniewicz, 398 Mass. 744, 749 (1986) (reversed because destruction of evidence during scientific testing made defense testing impossible; at new trial Commonwealth will be prohibited from making use of the tests); Commonwealth v. Cameron, 25 Mass. App. Ct. 538 (1988) (at retrial of "OUI" case, defendant can cross-examine on loss or destruction of booking videotape, and Commonwealth foreclosed from arguing camera malfunctioned). *See also* Commonwealth v. Hampe, 419 Mass. 514, 522–24 (1995) (if police obstructed independent blood-alcohol test, remedy may be to suppress police Breathalyzer test, as well as police observations made or opinions formed after defendant's right violated); Commonwealth v. Willie, 400 Mass. 427,

## 16.6C. STATEMENTS OF THE DEFENDANT AND CO-DEFENDANTS

Rule 14's automatic discovery provision obligates the prosecution to provide discovery of "any written or recorded statements, and the substance of any oral statements, made by the defendant or a co-defendant." [300] "Statement" is defined in Rule 14(d), and detailed *supra* at 16.3E, but the requirement to provide the substance of any oral statements goes beyond that definition. Earlier case law had mandated this discovery, albeit via defense motion;[301] Statements of conversations of the defendant and another person are encompassed by this provision, so long as in the possession, custody or control of the prosecution team.[302] (Thus, for example, jail recordings of the defendant are generally not discoverable under this provision, because they are in the custody of a third party and thus must be obtained via a Rule 17 motion.[303])

When a defendant's statement is not turned over until trial, he is likely to be severely prejudiced; decisions such as whether to plea bargain, whether the defendant should take the stand, or what witnesses to present, may be wrongly decided with severe consequences.[304] Indeed, the consequences of even delayed disclosure are potentially so severe that the Appeals Court has warned police officers and prosecutors who delay "run the risk that any non-disclosure may be found to be a prejudicial violation of rule 14, resulting in possible mistrial, and they may also invite disciplinary sanctions."[305] By contrast, when the defendant makes two substantially similar inculpatory statements and only one is turned over, the error may be harmless on the theory that defense counsel had access to the substance of both statements.[306]

---

434 (1987) (judge may exclude or limit the use of evidence if the defendant was deprived of an opportunity to possibly refute it).

[299] Commonwealth v. Phoenix, 409 Mass. 408, 415 n.3 (1991); Commonwealth v. Olszewski, 416 Mass. 707, 716–17 (1993), (where defendant knew general content of destroyed codefendant's statement to police exculpating defendant, sufficient remedy to allow defense to cross-examine police and codefendant on destruction and to instruct jury that they could draw adverse inference).

[300] Mass. R. Crim. P. 14(A)(1)(a)(i)

[301] Commonwealth v. Lewinski, 367 Mass. 889, 903 (1975)(substance of the defendant's oral statements must be provided "as a matter of course"). *See also* Commonwealth v. Gilbert, 377 Mass. 887, 892–94 (1979); Commonwealth v. Lopes, 25 Mass. App. Ct. 988 (1988); Commonwealth v. Lapka, 13 Mass. App. Ct. 24, 31 (1982); Commonwealth v. Janard, 16 Mass. App. Ct. 931, 933 (1983).

[302] Commonwealth v. Green, 72 Mass. App. Ct. 903 (2008).

[303] *See* Commonwealth v. Ogdren 455 Mass. 171 (2009) (Commonwealth required to obtain judicial approval before issuing subpoena for jail recordings).

[304] For example, in United States v. Padrone, 406 F.2d 560, 561 (2d Cir. 1969), a new trial was ordered because had the defendant been furnished with his statement he might not have taken the stand. Nondisclosure of a defendant's statement "is so serious a detriment to the preparation for trial . . . that where it is apparent, as here, that his defense strategy may have been determined by the failure to comply, there should be a new trial. Of course there may be cases where such a sanction is not called for, as where the statement consists of denials and the like and there is no prejudicial inconsistency between the defense and the statement which is withheld." *See also* United States v. Lewis, 511 F.2d 798, 800–03 (D.C. Cir. 1975) (error not to exclude defendant's oral statement, first revealed during cross-examination of defendant, because delay prejudiced defense and may have deterred plea bargain); Commonwealth v. Blaikie, 375 Mass. 601, 606–08 (1978) (no error at second trial, but court notes that first trial ended in mistrial because officer testified to oral statement of defendant that had not been produced in discovery).

[305] Commonwealth v. Lapka, 13 Mass. App. Ct. 24, 31 (1982). See also Commonwealth v. Green, 72 Mass. App. Ct. 903 (2008)(failure to provide defendant's statements may result in mistrial)..

[306] Commonwealth v. Kicelemos, 66 Mass. App. Ct. 1114 unpublished WL 1737569 (2006).

## 16.6D. DEFENDANT'S CRIMINAL RECORD

Mass. R. Crim. P. 7(d) requires the court to assure that the defendant's criminal record is provided at or before arraignment. A statute pertaining only to district court requires the same.[307] (A broader provision in Rule 14(a)(1)(D), discussed *infra*,[308] provides the defendant with automatic discovery of the Probation Department's records showing the prior complaints, indictments, and dispositions of all non-law-enforcement witnesses and all defendants.)

If the defendant has a criminal record, counsel should consider a motion seeking disclosure of whether the prosecutor intends to offer evidence of prior offenses committed by the defendant, as impeachment or otherwise,[309] or a motion in limine to bar their admission.

## 16.6E. GRAND JURY MINUTES AND STATEMENTS

The defendant has a right to pretrial discovery of the "grand jury minutes, and the written and recorded statements of a person who has testified before a grand jury." This is automatic and mandatory discovery under Rule 14(a)(1)(A)(ii), and previously was required by case law.[310] The rule requires the production of relevant transcribed or recorded testimony of every grand jury witness, whether or not the prosecution intends to call the witness at trial.[311] The 2004 revision, however, requires the prosecution to *also* provide automatic discovery of the minutes of the grand jury that brought the indictment in the case. This rule does not reach federal grand jury testimony, but case law suggests that in some circumstances the prosecutor must seek to obtain relevant federal grand jury testimony to provide to the defendant.[312]

Additionally, a literal reading of the provision appears to require not only the testimony of a grand jury witness, but also all of her prior written or recorded statements, wherever made. This exceeds the obligation in provision (a)(1)(A)(vii), which only requires discovery of statements by witnesses the Commonwealth intends to call at trial.[313]

---

[307] Dist./Mun. Cts. R. Crim. P. 3(a).

[308] *See* § 16.6F(2)

[309] Disclosure of such information during pretrial discovery is advised under the ABA Standards for Criminal Justice: Discovery and Trial by Jury, Standard 11-2.1(a)(vi) (3d ed. 1996). Such disclosure is important to the defendant's decisions whether to testify, move in limine to restrict use of the convictions, or plead guilty.

[310] Commonwealth v. Stewart, 365 Mass. 99 at 102–08 (1974) (requiring disclosure not later than close of direct at trial, but to avoid delay earlier disclosure preferred). *Accord* Commonwealth v. Stone, 366 Mass. 506, 513 (1974). *Cf.* Dennis v. United States, 384 U.S. 855, 874–75 (1966).

[311] Commonwealth v. Clemente, 452 Mass. 295, 312 (2008); Commonwealth v. Dew, 443 Mass. 620 (2005); Commonwealth v. Cavanaugh, 371 Mass. 46, 57–58 (1976). Of course, any exculpatory grand jury testimony from another case would be also subject to the Commonwealth's continuing duty to disclose exculpatory evidence were such evidence to come into its possession. Rule 14(a)(1)(A)(iii) and (a)(4); Clemente, supra.. Exculpatory evidence discovery is discussed in detail *supra* at §16.6A.

[312] *See* Commonwealth v. Liebman, 388 Mass. 483, 486–87 (1983) *(Liebman II),* and Commonwealth v. Liebman, 379 Mass. 671, 675 (1980) *(Liebman I)* (although ordinarily prosecutor's obligation is to disclose only information in his possession or the police's, to avoid unfairness stemming from two sovereignties, defendant had right to prior inconsistent statements in federal grand jury transcript).

[313] Commonwealth v. Durham, 446 Mass. 212, 220 (2006)

Under both statutory and Rule 14 provisions, judges are authorized to limit the disclosure of grand jury minutes to defendant's counsel in order to protect persons mentioned[314] or for other reasons of security.[315] "Other reasons of security" may include the protection of an ongoing investigation.[316]

## 16.6F. DISCOVERY CONCERNING WITNESSES

### 1. Names, Addresses and Birthdates of Witnesses

The automatic discovery right to witness names, addresses and birthdates is limited to witnesses whom the prosecution intends to present at trial. Beyond this, the 2004 revisions to Rule 14 distinguish between civilian and law enforcement witnesses. As to the former, subsection (a)(1)(A)(iv) mandates automatic discovery of the names, addresses, and dates of birth of the Commonwealth's prospective witnesses.[317] But in the case of a prospective law enforcement witness, subsection (a)(1)(A)(v) requires the Commonwealth to disclose only the officer's name and business address.[318] Unless his birthdate or home address is somehow exculpatory and must be disclosed for that reason, defense counsel must file a motion for discovery under Rule 14(a)(2) to obtain that information.[319] In addressing such a motion, the court should balance the defendant's interest in obtaining that information against the risk disclosure would present to the officer's safety.[320]

As to any witness -- civilian or law enforcement -- the Commonwealth may seek a 14(a)(6) protective order limiting disclosure of information otherwise required by mandatory discovery. (Statutes that allow victims and witnesses to request that their identities not be made public,[321] and that prohibit police and court officials from disseminating the names of sexual assault complainants to the

[314]. Under G.L. c. 268 §13D(d), if the Commonwealth demonstrates that the defendant is accused of a violent crime and that specific facts show that the defendant poses a threat to the victim or witness, the court may issue a protective order precluding defense counsel from distributing grand jury minutes to a defendant. *See also* Mass. R. Crim. P. 14(a)(6), providing for protective orders limiting discovery.

[315] *See* Mass. R. Crim. P. 14(a)(6); Commonwealth v. Dew, 443 Mass. 620 (2005)(defendant attempted to discover grand jury minutes regarding murder that happened two days before in same building to use in defense that someone else committed murder he was accused of). *See also* Commonwealth v. Holliday, 450 Mass. 794 (2008).

[316] Commonwealth v. Dew, 443 Mass. 620 (2005).

[317] Mass. R. Crim. P. 14(a)(1)(iv). The defendant is also entitled to this information in district court cases by statute. G.L. c. 218 §26A.

[318] Mass. R. Crim. P. 14(a)(1)(v).

[319] Mass. R. Crim. P. 14(a)(1)(v); G.L. c. 218 §26A; Commonwealth v. Righini, 64 Mass. App. Ct. 19 (2005). *Righini* also held that in the facts of that case, law enforcement witness birthdates did not constitute other "material and relevant evidence" that must also be turned over in automatic discovery. Cf. G. L. c. 66, sec 10(d)(home address and telephone of public safety and criminal justice system personnel are not public records and not subject to general disclosure).

[320] Commonwealth v. Righini, 64 Mass. App. Ct. 19 (2005). Where the Commonwealth discloses contact information and any criminal record of the officer, the need for dates of birth is diminished. *Id.*

[321] G.L. c. 258B, § 3(h), which, "[w]hen such a request is granted by the court, . . . prohibits the prosecutor, defense counsel, and other, *except when discussing the matter among themselves, from disclosing in open court* the witness's residential and work addresses and other specified information. The court may make further orders to maintain limited disclosure of the information." It is clear that the statute is not intended to prevent defense access to witnesses, but rather to protect the witness's privacy and security from threats by the public." Bennett, "Prosecutorial Misconduct: How to Protect Your Client and Strategies to Fight It When It Rears Its Ugly Head in Your case," *CPCS Annual Training Conference Materials,* at 7 (Nov. 14, 1997) (emphasis in original).

public,[322] do *not* authorize, without further court order, withholding witness names and addresses from the defense.)

One of the most common arguments for a protective order is that disclosure poses safety risks to the witness.[323] Because the Commonwealth bears the burden of making that case,[324] it arguably has to show the insufficiency of other less restrictive ways to deal with safety issues, such as ordering a supervised deposition of the witness instead of discovery of the address, or limiting disclosure to defense counsel only.[325] The Commonwealth also can be expected to oppose disclosure of the identity and address of informants.[326] Except in highly unusual cases, lay witness names, addresses and birthdates should be discoverable; the Supreme Judicial Court has said that the defendant's constitutional rights often depend on her counsel's ability to interview prosecution witnesses before of trial,[327] which "open[s] countless avenues of in-court examination and out-of-court investigation."[328] For the same reason, delayed disclosure may warrant postponing proceedings so that the defense has time within which to investigate and interview that witness.[329]

In addition to Rule 14's provisions, a *constitutional right* to the names and addresses of witnesses applies as well when the defendant is subject to prosecutorial discovery. If the defendant must provide names and addresses of its witnesses, so must the Commonwealth;[330] if the defendant is subject to a notice-of-alibi order, the Commonwealth is required to provide the defendant with the

[322] *See* G.L. c. 265, § 24C. "This statute in no way authorizes the Commonwealth to withhold such information from the defendant who is a party to the proceeding and not merely a member of the public." Bennett, "Prosecutorial Misconduct: How to Protect Your Client and Strategies to Fight It When It Rears Its Ugly Head in Your Case," *CPCS Annual Training Conference Materials* at 7 (Nov. 14, 1997). Additionally, there is a statutory bar to disclosure of the location of any domestic violence victims' program or rape crisis center. G.L. c. 233, § 20L.

[323] Reporter's Notes to Rule 14, citing Commonwealth v. Rivera, 424 Mass. 266, 269–72 (1997); Commonwealth v. French, 357 Mass. 356, 399 (1970).

CPCS advises that when "When the Commonwealth claims that there is a "security issue," counsel should consider requesting a hearing to establish whether a genuine security issue exists and what steps should be taken to accommodate that concern while assuring that the defendant's rights are not violated." Krupp et al. CPCS Training Bulletin 13–14 (June 1997). *See* Commonwealth v. Rivera, 424 Mass. 266, 269–72 (1997) (addresses of three prosecution witnesses kept secret for "security reasons," and defense given access by telephone from D.A.'s office, citing Commonwealth v. Cobb, 379 Mass. 456, 469–70 (1980) (because witnesses were made available for interview, and possible safety threat, denial of addresses was within court's discretion, citing Commonwealth v. MacDonald, 368 Mass. 395, 397 (1975)), *judgment vacated in part sub nom.* Massachusetts v. Hurley, 449 U.S 809 (1980), *appeal dismissed sub nom.* Commonwealth v. Hurley, 382 Mass. 690 (1981), *appeal reinstated,* 391 Mass. 76 (1984); Commonwealth v. French, 357 Mass. 356, 399 (1970).

[324] Commonwealth v. Holliday, 450 Mass. 794 (2008). The case further held that the Commonwealth "need not demonstrate a specific or actual threat to the safety of a witness when the danger to witness safety is inherent in the situation." *Id.*

[325] Pursuant to either Rule 14(a)(6)(protective order) or (a)(7)(amendment of discovery order).

[326] Disclosure of informant identities is addressed infra at § 16.6F(5).

[327] *See* Commonwealth v. Balliro, 349 Mass. 505, 517–18 (1965) ("To say that a defendant has a right to present his defence and then to deprive him of the means of effectively exercising that right would reduce the guarantee to an idle gesture. . . . It is too plain to be labored that the interviewing of prospective witnesses is an essential part of the preparation of a case for trial"). See *also* Commonwealth v. Benoit, 389 Mass. 411 (1983) (defendant should have been given opportunity to interview witness in Commonwealth custody before calling him as witness, but harmless error); and *infra* § 16.6F(6) (access to witnesses).

[328] Commonwealth v. Holliday, 450 Mass. 794 (2008), citing Smith v. Illinois, 390 U.S. 129, 131 (1968)

[329] Reporters Notes to Rule 14, citing Commonwealth v. Lopez, 433 Mass. 406, 413-414 (2001); Commonwealth v. Baldwin, 385 Mass. 165, 176–77 (1982); Commonwealth v Mains, 374 Mass. 733 (1978)

[330] Wardius v. Oregon, 412 U.S. 470 (1973).

names and addresses of all witnesses who will place the defendant at the scene or otherwise rebut the alibi;[331] and if the defendant files notice of his intent to defend by insanity, including the identity of his experts, the Commonwealth must provide the names and addresses of its expert witnesses.[332]

At trial, the defendant has an additional sixth amendment confrontation right to obtain the address of the witness, absent safety considerations.[333] It also should be noted that in a jury trial, all parties are obligated to provide a list of witnesses to insure that jurors are not connected to them.[264.5] When the list is read to the prospective jurors, the court must not identify any witness as appearing on behalf of a particular side.[334]

### 2. Criminal and Probation Records

Under Rule 14(a)(1)(D), the defendant is entitled to automatic discovery of the Probation Department's records showing the prior complaints, indictments, and dispositions of all non-law-enforcement witnesses and all defendants. In district court, a statute guarantees the same discovery.[335] Note that this discovery is not limited to records of convictions, for good reason; for example, even without a conviction, a witness who is on pretrial probation or faces criminal charges may be impeachable on grounds of bias or motive to lie.

This right is effectuated in two steps: pursuant to Rule 14 (a)(1)(A)(iv), the prosecution is to notify the Probation Department of the names, addresses, and birthdates of its prospective witnesses, other than law enforcement witnesses; and pursuant to Rule 14(a)(1)(D), the court is to issue an order at arraignment requiring the Probation Department to provide the information to the all parties within 5 days of its receipt of the prosecution's witness list. However, a pre-amendment case holds that the Commonwealth is not accountable for inadvertent probation department errors.[336]

It is worth noting what witness records Rule 14 does *not* provide, and recourse counsel may have to obtain them. First, Rule 14 does not automatically provide the records of a *law enforcement witness*. However, in district court there is a statutory right to law enforcement witness records.[337] In Superior Court, while there is no general right to law enforcement witness records, the Commentary to Rule 14 states that "in the rare case where a prospective police witness has a criminal record which could be used for impeachment, the Commonwealth should provide automatic discovery of this fact under subdivision (a)(1)(A)(iii)(exculpatory evidence)."[338] Second, it is not clear in the language of the

---

[331] *Id.*(due process requires Commonwealth reciprocate with alibi rebuttal witnesses); Commonwealth v. Edgerly, 372 Mass. 337 (1977) (same).

This discovery must take place sufficiently in advance of trial to permit investigation by the defendant of these prosecution witnesses. Commonwealth v. Hanger, 377 Mass. 503, 509 (1979).

[332] Wardius v. Oregon, 412 U.S. 470 (1973); Blaisdell v. Commonwealth. 372 Mass. 753 (1977), and Commonwealth v. Edgerly, 372 Mass. 337 (1977).

[333] Commonwealth v. Johnson, 365 Mass. 534, 544, 547–48 (1974) (reversed because witness would not divulge identities of other witnesses and judge did not weigh interests of safety versus need); Commonwealth v. McGrath, 364 Mass. 243, 250–52 (1973). *See also* Commonwealth v. Righini, 64 Mass. App. Ct. 19 (2005)(confrontation clause right to birthdates applies only at trial).

[264.5] However, the Commonwealth's failure to name one of its witnesses was upheld in Commonwealth v. Soares, 51 Mass. App. Ct. 273, 283 (2001), on grounds that jurors had been asked whether they knew, by name, the witness's mother or brother or members of their immediate family.

[334] Commonwealth v. Bolduc, 383 Mass. 744, 746–48 (1981).

[335] MGL c. 218 s. 26A.

[336] Commonwealth v. Devlin, 365 Mass. 149, 163–64 (1974).

[337] MGL c. 218 s. 26A.

[338] Reporter's Notes to Rule 14(a)(1)(A)(v). Access to a criminal record that demonstrates bias is *constitutionally* required because it is deemed exculpatory evidence. Lewis v. United States, 393 A.2d 109 (D.C.

Rule that *juvenile delinquency records* are mandated. But the defendant may have a constitutional right to such records – both as exculpatory evidence that may impeach the credibility of a witness, and as a confrontation clause right to any juvenile records that may indicate bias.[339] And finally, Probation Department records reveal only Massachusetts charges and convictions. As the Commentary to Rule 14 notes, where facts suggest that a witness has an *out-of-state record,* "an inquiry as to out-of-state convictions may be a reasonable practice."[340] Regarding federal criminal records, the Supreme Judicial Court has stated that normally the state would be obligated on request to produce the federal "rap sheet" of witnesses to the defendant since they were available as a matter of course to the state but not the defendant.[341]

### 3. Statements of Witnesses

Statements of witnesses the prosecution *intends to call at trial* are discoverable under the automatic discovery provision 14(a)(1)(A)(vii). (In *district courts and the BMC,* discovery of a witness' statement is statutorily guaranteed, *whether or not the prosecution intends to call him to testify.*[342] However, a discovery motion is required in order to obtain this broader category of discovery in district court.) While not included as automatic discovery, the court may, on a defense motion, order the prosecution produce any statements of witnesses it does not intend to call.[343]

Rule 14(d) details what counts as discoverable "statements": (d)(1)'s definition applies to statements that have been written or adopted by the witness herself, and (d)(2)'s definition applies to a witness' oral statement that has been written or recorded by someone else. Although not explicitly identified in Rule 14's definition, the Supreme Judicial Court has held that a producible statement also includes sketches or diagrams by the witness.[344] The 14(d) definitions list several requirements for automatically-discoverable statements that are detailed *supra* at § 16.3E.

Apart from the prerequisites contained in the 14(d) definitions, note the following limits on the kinds of statements that must be turned over as part of automatic discovery. (1) Like other automatic discovery items, only those statements in the possession, custody or control of the prosecution are included. Statements in the hands of others may be summonsed pursuant to Mass. R. Crim. P. 17.[345] (2) Preliminary drafts or notes that have been incorporated into a subsequent or final draft need not be produced so long as the latter are turned over[346] -- a provision that eliminates the burden of keeping

---

1978), *aff'd on rehearing,* 408 A.2d 303, 309 (D.C. 1979) (impeachable criminal records must be disclosed under *Brady,* and juvenile records should be examined by judge to determine whether disclosure is required). *See also* Commonwealth v. Ferraro, 368 Mass. 182 (1975) (defendant has confrontation clause right of access to juvenile records that indicate bias or interest, despite confidentiality of juvenile records under G.L. c. 119, § 60). *But see* United States v. Agurs, 427 U.S. 97, 108, 114 (1976) (because arrest record was not requested and did not raise reasonable doubt, no reversal required). Exculpatory evidence is addressed *supra* at § 16.6A.

[339] Commonwealth v. Ferrara, 368 Mass. 182 (1975).

[340] Reporter's Notes to Rule 14(a)(1)(A)(iv), citing Commonwealth v. Corradino, 368 Mass. 411, 422 (1975) and Commonwealth v. Donahue, 396 Mass. 590, 599 (1986)(normally the state must produce the federal "rap sheet" of witnesses to the defendant).

[341] Commonwealth v. Donahue, 396 Mass. 590, 599 (1986). FBI "rap sheets" are not available to private parties and are exempt from FOIA disclosure. Department of Justice v. Reporters Comm., 489 U.S. 749 (1989).

[342] G.L. c. 218, § 26A, ¶ 2.

[343] Commonwealth v Durham, 446 Mass. 212, 220 (2006).

[344] Commonwealth v. McGann, 20 Mass. App. Ct. 59, 65 (1985).

[345] *See* Commonwealth v. Wanis, 426 Mass. 639, 644 (1998) (on motion under Rule 17, judge should normally issue subpoena to police internal affairs division for statements of percipient witnesses, without special showing of relevance or need).

[346] Mass. R. Crim. P. 14(d)(1)

every draft of a police report, for example, but which unfortunately has the potential to bury potentially significant inconsistencies. (3) Under this automatic discovery subdivision, only statements of the prosecutions prospective witnesses need be produced.[347] Statements of individuals the prosecution does not intend to call at trial are not subject to automatic discovery, and must be pursued by a 14(a)(2) motion for discovery. The SJC has stated that nothing in the Reporter's Notes to Rule 14 suggests that these statements are not discoverable by motion.[348]

Despite these limitations in subsection 14(a)(1)(A)vii and 14(d), certain witness statements must be furnished to the defendant under other provisions or case law. *First*, written or recorded statements of witnesses who testified in the *grand jury* are automatically discoverable under Rule 14(a)(1)(A)(ii), whether or not the prosecution intends to call the witness at trial. *Second*, a statement containing *prior inconsistent statements* may be discoverable under the defendant's constitutional right to exculpatory evidence as soon as the inconsistency becomes known. As the Supreme Judicial Court has stated, in the case of an important witness, "the defense will properly view even relatively minor discrepancies in prior statements as exculpatory."[349] *Third*, under a separate but similar analysis the Commonwealth is obligated to turn over any statement, oral or written, that *corrects the witness's prior statement*.[350] *Finally,* while Rule 14 does not generally encompass oral statements that have not been recorded,[351] in some circumstances the prosecutor is obligated to *reduce an oral statement to writing* and furnish it to the defendant. These include: a statement of the defendant or a codefendant;[352] a statement that contradicts an earlier statement by the witness or is otherwise exculpatory;[353] and, possibly, a statement that the prosecutor deliberately failed to reduce to writing so as to avoid discovery.[354]

---

[347] Mass. R. Crim. P. 14(a)(1)(A)(vii).

[348] Commonwealth v. Durham 446 Mass. 212, 220 (2006).

[349] Commonwealth v. St. Germain, 381 Mass. 256, 262 (1980). *Accord* Commonwealth v. Vaughn, 32 Mass. App. Ct. 435, 439–42 (1992) (reversed) Commonwealth v. Baldwin, 385 Mass. 165, 174 (1982); Commonwealth v. Scalley, 17 Mass. App. Ct. 224, 228–29 (1983). *See also* In re Roche, 381 Mass. 624, 637 (1980) (prior inconsistent statements would be "highly relevant" to the case).

The constitutional requirements regarding production of exculpatory evidence are addressed *supra* at § 16.6A.

[350] Commonwealth v. Vaughn, 32 Mass. App. Ct. 435, 440 ff. (1992) (prosecutor knew of but did not disclose crucial change in testimony of key Commonwealth witness; conviction reversed); Commonwealth v. Borans, 379 Mass. 117, 153 (1979); Commonwealth v. Gilbert, 377 Mass. 887, 892 (1979). *Compare* Commonwealth v. Richenburg, 401 Mass. 663, 672 (1988) (not a violation of pretrial agreement if witness's testimony differs somewhat from produced written report, particularly if prosecutor did not know testimony would differ before witness took stand); Commonwealth v. McLeod, 394 Mass. 727, 743–44 (1985) (variance does not demonstrate *Brady* violation).

[351] Commonwealth v. Spann, 383 Mass. 142, 148–50 (1981) (Commonwealth had no duty to reduce statement of witness to writing absent an agreement to do so). A list of phone numbers may be a formal enough presentation of information to qualify as a statement or persons, but where the witness orally recited the list and it was not reduced to writing, the Commonwealth did not violate their discovery obligations to turn over statements of witnesses. Commonwealth v. Sanders, 451 Mass. 290 (2008).

[352] Mass. R. Crim. P. (a)(1)(a)(i); Commonwealth v. Lewinski, 367 Mass. 889, 903 (1975).

[353] Commonwealth v. Vaughn, 32 Mass. App. Ct. 435, 439–42 (1992) (reversed); Commonwealth v. Borans, 379 Mass. 117, 153 (1979); Commonwealth v. Gilbert, 377 Mass. 887, 893 (1979). *See also infra* § 16.6.A, regarding exculpatory evidence.

[354] See Commonwealth v. St. Germain, 381 Mass. 256, 261 n.5 (1980). *Cf.* Commonwealth v. Santiago, 30 Mass. App. Ct. 207, 221–22, n.5 (1991) (advising that in taking notes, police officers should at least note exculpatory statements or the fact that none were made); Commonwealth v. Gilbert, 377 Mass. 887, 893 (1979)(the attorney's duty to disclose a witness statement should not turn on his own election whether to reduce it to writing).

### 4. Rewards, Promises, and Inducements

A government inducement to obtain cooperation or testimony from a witness affects the credibility of that witness. (Indeed, counsel's failure to impeach a testifying witness regarding her agreement with the government may amount to ineffective assistance of counsel.[355]) Therefore, defense counsel is entitled to discover any such arrangement,[356] and Rule 14 now effectuates this right by mandating automatic discovery **of** all promises, rewards, and inducements given to witnesses the prosecution intends to call at trial.[357] As the SJC recently stated, non-disclosure of this information may violate the defendant's right to due process.[358] Most commonly, the due process violations will be the denial of rights to exculpatory evidence and to confront witnesses.

"Rewards, promises or inducements" is construed broadly. It includes any reward or promise the Commonwealth makes to induce a witness to testify, including promises that are merely implicit,[359] or offer no more than the possibility of a reward[360] or "consideration" in future proceedings.[361] But even if there is no quid pro quo for testimony, the government is obligated to disclose any agreement or understanding it had with a witness[362] or his attorney;[363] any assistance to the witness, such as drug

[355] Commonwealth v. O'Neil, 51 Mass. App. Ct. 170 (2001) (counsel ineffective for failing to impeach cooperating witness).

[356] Gigilo v. United States, 405 U.S. 150, 154–55 (1972) (nondisclosure of promise to witness of nonprosecution in return for testimony); Banks v. Dretke, 540 U.S. 668 (2004); Napue v. Illinois, 360 U.S. 264, 269 (1959) (new trial required because prosecution did not correct false testimony that no consideration had been given in return for testimony); United States v. Lynn, 856 F.2d 430 (1st Cir. 1988); United States v. Flaherty, 668 F.2d 566 (1st Cir. 1981); Zeigler v. Callahan, 659 F.2d 254, 263 (1st Cir. 1981) (two-pronged test to determine whether failure to disclose terms of plea bargain requires reversal); Commonwealth v. Rebello, 450 Mass. 118, 122 (2007); Commonwealth v. Hill, 432 Mass. 704, 715 (2000)("Commonwealth's deliberate failure to disclose its agreement with [the witness], despite requests for such information, was of constitutional dimension"); Commonwealth v. Luna, 410 Mass. 131, 139–40 (1991); Commonwealth v. Paradise, 24 Mass. App. Ct. 142 (1987); Commonwealth v. Johnson, 21 Mass. App. Ct. 28, 40–41 (1985) (must disclose implicit quid pro quo regarding pending charges even if no explicit promises); Commonwealth v. Paciuti, 12 Mass. App. Ct. 833, 838–39 (1981) (prosecutor should have disclosed evidence that witness was in protective custody and receiving living expenses); Commonwealth v. Nelson, 3 Mass. App. Ct. 90, 100–01 (1975) (same). *But see* Commonwealth v. Fuller, 394 Mass. 251 (1985) (money given by prosecutor to witnesses who feared retribution to fly to Florida not exculpatory evidence); Commonwealth v. Daigle, 379 Mass. 541, 546–48 (1980) (because neither witness nor prosecutor knew that witness's statement regarding no pending cases was false, higher materiality threshold applies, which defense failed to demonstrate).

[357] Mass. R. Crim. P. 14(a)(1)(ix).

[358] Commonwealth v. Rebello, 450 Mass. 118, 122 (2007), citing Commonwealth v. Birks, 435 Mass. 782, 787 (2002).

[359] Commonwealth v. Johnson, 21 Mass. App. Ct. 28, 40-41 (1985).

[360] Commonwealth v. Luna, 410 Mass. 131, 139–40 (1991). This also entitles the defendant to "a specific instruction that the jury weigh such a witness's testimony with care". *Id. See also* Commonwealth v. DeCicco, 51 Mass. App. Ct. 159, 166 (2001)(Brown, J., dissenting). *But see* Commonwealth v. Schand, 420 Mass. 783, 792–93 (1995) (no relief where defendant unable to prove more than prosecutor's promise to be "fair" with witnesses, who subsequently received lenient sentences).

[361] Commonwealth v. Birks, 435 Mass. 782 (2002).

[362] California v. Trombetta, 467 U.S. 479, 485 (1984) (witness plea agreements must be disclosed); Commonwealth v. O'Neill, 51 Mass. App. Ct. 170, 176 n. 6, further app. rev. den., 434 Mass. 1104 (2001); Commonwealth v. Collins, 386 Mass. 1 (1982). In *Collins,* a new trial was required when a government witness was offered a plea bargain, which had nothing to do with testimony in the trial. The court found that this evidence might in itself have created a reasonable doubt since "we are aware of the effect that any inference of prosecutorial favoritism might have on a jury's estimation of a witness' credibility."

treatment, a hotel room, or money for food;[364] and any assistance from the witness to the government in another case.[365] Benefits to a Commonwealth witness subsequent to her testimony may have nothing to do with any pretrial inducement,[366] but alternatively, they may indicate a tacit, undisclosed, or more favorable agreement between the Commonwealth its witness than was previously disclosed.[367]

The requirement that any promises, rewards, or inducements be automatically disclosed to the defendant only applies to the Commonwealth's prospective witnesses.[368] Inducements to others are not covered, but the Commentary accompanying this provision notes that it "does not exhaust the Commonwealth's constitutional obligation to disclose all exculpatory evidence, or its parallel obligation under subdivision (iii) of this Rule. Such exculpatory evidence could, for example, include a promise or inducement made to a hearsay declarant who the Commonwealth does not intend to present at trial." Or it could include inducements to a non-testifying informant that might support an entrapment defense.[369]

### 5. Informants

Rule 14(a)(1)(A)(iv) mandates automatic discovery of names, addresses, and dates of birth of the Commonwealth's prospective non-law enforcement witnesses. Informants often will *not* be testifying witnesses, but if they are, the Commonwealth may move for a protective order against disclosure. The argument is assisted by *Roviaro v. United States,*[370] in which the Supreme Court defined a limited privilege of the government to withhold the identity of police informants. However, this privilege must give way when (1) the identity of the informant is already known by those with cause to resent him[371] or (2) "where the disclosure of an informant's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination." According to *Roviar*o, the latter test requires a balancing of the government's interest

[363] Commonwealth v. Gilday, 382 Mass. 166, 175–76 (1980) (promise to witness's attorney not known to witness must be disclosed).

[364] Commonwealth v. Smith, 456 Mass. 476 (2009). Even if the purported purpose of providing a hotel room to a witness is for their protection, it could reasonably be seen as a promise reward or inducement and should be disclosed. Id., 484 n. 2 (2009). *But see* Commonwealth v. Lay, 63 Mass. App. Ct. 27 (2005) (Commonwealth did not fail to disclose promises, rewards, or inducements where detective gave witness beer money at a cook-out months before the offense in question took place and no connection was established that the money was in exchange for testimony).

[365] Commonwealth v. Molina, 454 Mass. 232 (2009) (testifying witness providing information to State Police drug unit in separate investigation, Commonwealth required to disclose the information to defense counsel, but no error where disclosure was delayed and defense counsel able to effectively cross-examine witness).

[366] Commonwealth v. Morgan, 449 Mass. 343 (2007) (finding no error where Commonwealth only disclosed that witness's testimony would be "taken into consideration," then interceded on witness's behalf in an immigration matter post-trial after Commonwealth learned witness faced threats in home country; courts finds pre-trial disclosure fully reflected the understanding before and during trial.).

[367] *See* Commonwealth v. Rebello, 450 Mass. 118, (2007) (defendant argued unsuccessfully that dismissal or murder charges after witness who testified against him demonstrated an undisclosed agreement between the Commonwealth and testifying witness).

[368] Commonwealth v. Velez, 77 Mass. App. Ct. 270 n. 6 (2010) (Commonwealth not required to disclose promises, rewards, or inducements automatically, under Rule 14(a)(1)(ix) where witness does not testify).

[369] *See* Commonwealth v. Madigan, 449 Mass. 702 (2007).

[370] 353 U.S. 53 (1957).

[371] Rovario v. United States, 353 U.S. 53 (1957); Commonwealth v. Curcio, 26 Mass. App. Ct. 738, 746–49 (1989). *Cf.* Commonwealth v. Velez, 77 Mass. App. Ct. 270 (2010) (Commonwealth's privilege against disclosure of identity of confidential informant applied even where defendant knew informant's true identity).

in protecting the flow of information against an individual's right to prepare his defense, "taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."[372] Disclosure of an informant's identity is also subject to automatic discovery if her identity and role are potentially exculpatory, whether or not the informant will testify.[373] The government may not "withhold information concerning any informant where, as here, the information is material to the defense and potentially exculpatory."[374] The criterion for materiality is "whether disclosure would have provided material evidence needed by the defendant for a fair presentation of his case to the jury."[375]

Where the privilege is overcome, the government must not only reveal the informant's identity but also provide his location to the defense.[376]

Disclosure is often important to the defense when the informant is either a witness to the alleged crime or the claimed basis of probable cause to search. "[W]here the informer is an active participant in the alleged crime or the only non-government witness, disclosure has usually been ordered."[377] Finding that the informant could have been relevant and helpful to the defense, several Massachusetts cases have reversed convictions for drug sales witnessed and arranged by an informant whose identity was not disclosed;[378] the defendant does not bear any burden to demonstrate prejudice if

[372] Rovario, *supra*, at 62. *Accord* Commonwealth v. Connolly, 454 Mass. 808 (2009); Commonwealth v. Dias, 451 Mass. 463, 468 (2008); Commonwealth v. Madigan, 449 Mass. 702, 705-706 (2007); Commonwealth v. Abdelnour, 11 Mass. App. Ct. 531. 538 (1981); Commonwealth v. Collins, 11 Mass. App. Ct. 126. 139–40 (1981); Commonwealth v. Swenson, 368 Mass. 268. 275–78 (1975) (balancing test between Commonwealth and individual interests); United States v. Formanczyk, 949 F.2d 526 (1st Cir. 1991). *Cf.* Commonwealth v. Johnson, 365 Mass. 534, 543–46 (1974) (despite safety concerns, right to confront witnesses, guaranteed by art. 12 and the Sixth Amendment, affords cross-examination regarding informants when would affect the fairness of the trial).

To determine the proper balance of interests, the SJC had held that *ex parte submissions* and *in camera* inspection would suffice. *Abdelnour, supra,* 11 Mass. App. Ct. at 536 n.5; *Collins, supra,* 11 Mass. App. Ct. at 140. The new protocol for assessing whether presumptively privileged documents in third part hands should be available for use at trial provides for defense counsel to review documents, a procedure that would seem to apply to in this case as well. *See* discussion of the Dwyer protocol *supra* at § 16.3C.

[373] Rule 14(a)(1)(A)(iii).

[374] Commonwealth v. Madigan, 449 Mass. 702, 711 (2007), citing *Roviaro, supra* at 60.

[375] Madigan, supra at 706, citing Lugo, supra, at 571-72.

[376] See United States v. Williams, 496 F.2d 378. 382 (1st Cir. 1974) (government duty under *Roviaro* to provide names and addresses of informants requires it to use reasonable diligence to locate informer); Commonwealth v. Curcio, 26 Mass. App. Ct. 738, 746–47 (1989) (Commonwealth cannot obstruct access to informer whose identity is known to the defense, and must offer what it knows of location). *Compare* Commonwealth v. Manrique, 31 Mass. App. Ct. 597, 602 (1991) (to show prosecution nondisclosure of informant's whereabouts, motion denial insufficient because defendant did not follow up prosecution's offer to reveal informant's whereabouts); Commonwealth v. Ramos, 30 Mass. App. Ct. 915, 916–17 (1991) (citing Commonwealth v. Monteiro, 396 Mass. 123, 129 (1985) (without specific request by defendant, Commonwealth not bound to disclose that it used an informer or to disclose his identity)).

[377] Commonwealth v. Lugo, 406 Mass. 565, 569–74 (1990) (analogizing surveillance location disclosure to informant's privilege, and holding location should have been revealed). *See also* Commonwealth v. Madigan, 449 Mass. 702 (2007); Commonwealth v. Healis, 31 Mass. App. Ct. 527 (1991); Commonwealth v. McMiller, 29 Mass. App. Ct. 392, 405–06 (1990) and Brown, J. concurrence at 409–10 ("it is fundamentally unfair for the Commonwealth to use a person . . . as an agent for the purpose of investigating a crime, and then try to insulate an essential witness to the defense"); Commonwealth v. Fernandes, 30 Mass. App. Ct. 335, 342–43 (1991).

[378] Commonwealth v. Taliceo, 13 Mass. App. Ct. 925 (1982) (rescript); Commonwealth v. Grasso, 9 Mass. App. Ct. 832 (1980) (rescript); Commonwealth v. Ennis, 1 Mass. App. Ct. 499, 503 (1973). *See also* Commonwealth v. Shaughessy, 455 Mass. 346 (2009) (government's privilege may not shield information that is material to a defense of entrapment, as to which the defendant has made an adequate pretrial showing). *Cf.* Commonwealth v. Madigan, 449 Mass. 702 (2007)(approving denial of prosecution's petition again disclosure).

the informant was in a position to be helpful because he cannot know what the testimony would have been.[379] But in the search context, more stringent standards have emerged. Where the defendant seeks disclosure of an informant's identity in order to challenge the truthfulness of an affidavit supporting a search warrant, he must make a threshold showing that police fabricated the informant's existence or the alleged corroboration, that the police used information they knew was patently unreliable, or that the police conduct is inexplicable in light of the alleged informant's statements.[380] More generally, the Supreme Court has held that when probable cause to search is at issue, disclosure of an informant's identity is not routinely required under the due process clause but is within the discretion of the judge, who must determine whether she needs disclosure in order to decide whether the officer is believable.[381]

### 6. Access to Witnesses

Although Commonwealth witnesses are not obligated to talk with defense counsel, they are the "property" of neither side and it is unconstitutional for the Commonwealth to either instruct a witness not to speak or deny the defense counsel access to him.[382] Defense counsel is entitled to talk with

[379] "There is . . . no requirement that a defendant, denied access to evidence that might prove helpful in his defense, must make a specific showing of just what the evidence would have proved and how far he was prejudiced by the withholding." Commonwealth v. Lugo, 406 Mass. 565, 572 (1990) (quoting Commonwealth v. Johnson, 365 Mass. 534, 547 (1974)). *See also* Commonwealth v. Choice, 47 Mass. App. Ct. 907, 908 (1999)(exclusion of defense question concerning identity of witness to drug sale was reversible error); Commonwealth v. Ennis, 1 Mass. App. Ct. 499, 504 (1973). Commonwealth v. Healis, 31 Mass. App. Ct. 527 (1991). *But see* Commonwealth v. Youngsworth, 55 Mass. App. Ct. 30 (2002)(disclosure of informant's identity not required); United States v. Martinez, 922 F.2d 914 (1st Cir. 1991) (anonymous tipster not present during crucial events so defendant must make showing why presence of informant at trial would help defense).

[380] Commonwealth v. Abdelnour, 11 Mass. App. Ct. 531, 535–36 (1981). Without this showing, no hearing is required on whether to disclose the identity of the informant. A bare assertion that the search warrant affidavit was false is insufficient to require disclosure of an informant's identity. Commonwealth v. Douzanis, 384 Mass. 434, 439 (1981); Commonwealth v. Carpenter, 22 Mass. App. Ct. 911 (1986). In *Douzanis supra*, 384 Mass. at 441–42, the court suggested that an in camera hearing might be held with the officer or the informant to determine whether disclosure is required.

The requirement of a threshold showing applies not only to requests for the informant's identity, but also for details that would in effect identify the informant. Commonwealth v. John, 36 Mass. App. Ct. 702 (1994) (absent threshold showing, abuse of discretion to order disclosure of details of controlled buys of drugs).

The requirement of a preliminary showing partly derives from the decisions in Franks v. Delaware, 438 U.S. 154, 155–56 (1978), and Commonwealth v. Reynolds, 374 Mass. 142 (1977), holding that no hearing on the veracity of a search warrant affidavit need be held unless there is a preliminary showing that a false or reckless material statement is in the affidavit. In Commonwealth v. Ramirez, 416 Mass. 41 (1993), the S.J.C. ordered a *Franks* hearing be held based on the pattern of warrant affidavits that were strikingly similar, relied on the same informant, and resulted in few contraband seizures, finding it an adequate threshold showing. *See infra* § 17.8E.

[381] McCray v. Illinois, 386 U.S. 300, 308, 312 (1967). However, in Franks v. Delaware, 438 U.S. 154, 170 (1978), the court left open the possibility that on a preliminary showing that the affidavit contains false statements, the Constitution might require revelation of the informant's identity. *See also* Commonwealth v. Snyder, 413 Mass. 521, 532–33 (1992) (refusal to order disclosure of identity of school drug informant upheld where no showing that disclosure would have helped defendant; nondisclosure privilege stronger where source of information bears on preliminary question, such as suppression of evidence, than nondisclosure at trial of a source of evidence, where guilt or innocence directly involved); Commonwealth v. Clarke, 44 Mass. App. Ct. 502 (1998); Commonwealth v. Fernandes, 30 Mass. App. Ct. 335 (1991) (trial judge correctly denied request for informant identity where informant was merely a "tipster").

[382] Commonwealth v. Adkinson, 442 Mass. 410, 416-17 (2004), citing Commonwealth v. Balliro, 349 Mass. 505, 515–18 (1965). In *Balliro*, the court reversed a conviction based on violation of the right to present a defense embodied in art. 12 of the Mass. Const. Declaration of Rights where the Commonwealth had denied

obliging Commonwealth witnesses separately and outside the presence of the prosecutor.[383] This right is of constitutional dimension; as the Supreme Judicial Court has noted, the defendant's constitutional rights often depend on her counsel's ability to interview prosecution witnesses in advance of trial.[384] In the United States Supreme Court's description, part of the constitutional right to present a defense is "what might loosely be called the area of constitutionally guaranteed access to evidence."[385]

The right of access is simply the opportunity to seek a witness interview without Commonwealth interference. The witness need not agree; by statute, "victims and witnesses [shall have the right] to be informed of the right to submit to or decline an interview by defense counsel or anyone acting on the defendant's behalf, except when responding to lawful process, and, if the victim or witness decides to submit to an interview, the right to impose reasonable conditions on the conduct of the interview."[386]

If witnesses will not speak with counsel, it is important to inquire whether they have been instructed not to speak. If so, *Commonwealth v. St. Pierre* prescribed the remedy: the judge should have the witnesses brought to court, instruct them that they may speak to defense counsel and explain "in some detail the basis and dimensions of the [*Balliro*] principle," and provide defense counsel access to them on neutral ground free from prosecutorial influence.[387] As to alternative remedies, *St. Pierre*

---

defense counsel access to three witnesses in its custody. *Accord* Commonwealth v. Benoit, 389 Mass. 411, 426–28 (1983); Commonwealth v. St. Pierre, 377 Mass. 650, 657–61 (1979); Commonwealth v. Flynn, 362 Mass. 455, 461 (1972); Commonwealth v. Carita, 356 Mass. 132, 142–43 (1969); Commonwealth v. Curcio, 26 Mass. App. Ct. 738, 746–47 (1989) (Commonwealth cannot obstruct access to informer whose identity is known to the defense, and must offer what it knows of location); Commonwealth v. McMiller, 29 Mass. App. Ct. 392, 405–09 (1990) and Brown, J. concurrence at 409–10 (government threat to prosecute witness caused witness to refuse to testify); United States v. Angiulo, 897 F.2d 1169 (1st Cir. 1990); United States v. Bailey, 834 F.2d 218 (1st Cir. 1987); Kines v. Butterworth, 669 F.2d 6, 8–9 (1st Cir. 1981) (dictum); Gregory v. United States, 369 F.2d 185, 188 (D.C. Cir. 1966) (prosecutor telling defense witnesses not to talk to counsel violated elemental due process).

*See also* S.J.C. Rule 3:08, PF 3(b) (unprofessional conduct for prosecutor to discourage witness interview with defense, although prosecutor may state there is no duty to do so), and S.J.C. Rule 3:08, DF 9 (same strictures on defense counsel).

[383] Commonwealth v. Holliday, 450 Mass. 794, 803 (2008); Commonwealth v. Adkinson, 442 Mass. 410, 416-17 (2004);Commonwealth v. Flynn, 362 Mass. 455, 461 (1972); Commonwealth v. Doherty, 353 Mass. 197, 211 (1967), *cert. denied sub nom.* Doherty v. Massachusetts, 390 U.S. 982 (1968).

See *also* Dennis v. United States, 384 U.S. 855 (1966) (restriction on right to interview witnesses only when "clearest and most compelling consideration" requires, e.g., safety); and Salemme v. Ristaino, 587 F.2d 81, 87 (1st Cir. 1978) (right to interview witnesses).

[384] *See* Commonwealth v. Balliro, 349 Mass. 505, 517–18 (1965) ("To say that a defendant has a right to present his defence and then to deprive him of the means of effectively exercising that right would reduce the guarantee to an idle gesture. . . . It is too plain to be labored that the interviewing of prospective witnesses is an essential part of the preparation of a case for trial"). See *also* Commonwealth v. Benoit, 389 Mass. 411 (1983) (defendant should have been given opportunity to interview witness in Commonwealth custody before calling him as witness, but harmless error).

[385] California v. Trombetta, 467 U.S. 479, 485 (1984), quoting United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982). *Valenzuela-Bernal* held that the government cannot deport potential witnesses if it would diminish the defendant's opportunity to present an effective defense.

[386] G.L. c. 258B, § 3(m), upheld in Commonwealth v. Rivera, 424 Mass. 266, 272–273 & n. 9 (1997).

[387] Commonwealth v. St. Pierre, 377 Mass. 650, 657–61 (1979) (officer instructed five corrections officers not to speak to defense) (citing Commonwealth v. Carita, 356 Mass. 132 (1969), and Commonwealth v. Balliro, 349 Mass. 505 (1965) and other cases cited at 658 n.9). *See also* Commonwealth v. Rivera, 424 Mass. 266, 269–72 (1997) (holding that, despite prosecutor's expression to witness of his preference to be present at her interview with defense counsel, potential for undue influence removed by judge's colloquy). In Commonwealth v. Benoit, 389 Mass. 411, 426–28 (1983), a witness was located only through judicial process. Since the

described the remedy sought by defense counsel in that case — an order that the Commonwealth direct the witnesses to speak to the defense — as the "wrong agent and the wrong message"[388] but stated that in extreme cases where the Commonwealth has handicapped the defendant's ability to discover witness testimony, dismissal might be appropriate.[389] On appellate review, the court will be "wary of concluding too readily that a defendant did not suffer prejudice" and will assume that the witnesses would have spoken with defense counsel had prosecutorial misconduct not occurred.[390]

The right of access applies to witnesses who are in custody, to minors, and (although subject to a judicial determination) to Commonwealth informants::

*Informants:* The right to information concerning an informant is subject to balancing against a qualified privilege. See *supra* § 16.6F(5). If the informant's identity is already known the Commonwealth must offer what it knows of his location.[391]

*Witness in custody*: A defendant has a right to an opportunity to interview prospective witnesses held in Commonwealth custody.[392] When such a witness has not directly communicated to counsel a desire not to be interviewed, the procedure described in *Commonwealth v. Carita* should be followed.[393] Under this procedure, counsel should "file a motion to be allowed to interview the witness. The witness should thereafter be brought to court and instructed on his or her rights to consent or not to consent to an interview. A record should be kept of the proceedings. The answer of the witness will then determine whether an interview is to take place. If the answer is in the affirmative, a transcript of such interview may be taken in the discretion of the judge." [394]

*Minors:* When a minor is the witness, the decision whether to speak with defense counsel rests with the parents or, if the minor is in state custody, with the custodial department (so long as it is not acting as an agent of the prosecution).[395] The decision-maker, parent or department, rather than the parent or guardian, should be brought to court to be read the *Carita* colloquy.[396]

---

defendant had no access to him before trial, the S.J.C. held that a recess should have been given so that the defendant might interview the witness before offering his testimony, but found the error harmless.

[388] Commonwealth v. St. Pierre, 377 Mass. 650, 658 (1979). Nevertheless, egregious circumstances might warrant *coupling* this motion with the others as a means of undoing prejudicial prosecutorial conduct.

[389] Commonwealth v. St. Pierre, 377 Mass. 650, 660–61 (1979). The court cited as an example a case in which the Commonwealth intentionally thwarts discovery by violating *Balliro* and also avoiding a probable-cause hearing, using hearsay in the grand jury, and avoiding memorializing in writing its witnesses' statements.

Any defense motion on this ground should cite violation of the state and federal constitutions, specifically by abridging the due process right to a fair balance of forces between the accused and the state, the right to counsel, and especially the right to present a defense.

[390] Commonwealth v. St. Pierre, 377 Mass. 650, 659 (1979). The court noted the "high value of the *Balliro* principle [and] the obvious difficulties in tracing the effects of a violation" but nevertheless affirmed the conviction. *See also* Commonwealth v. McMiller, 29 Mass. App. Ct. 392, 408 (1990) (reversed); Commonwealth v. Healis, 31 Mass. App. Ct. 527 (1991) (need not show prejudice from denial of identity of participant informant).

[391] Commonwealth v. Curcio, 26 Mass. App. Ct. 738, 746–47 (1989).

[392] Commonwealth v. Adkinson, 442 Mass. 410, 417 (2004), citing *Commonwealth v. Balliro, supra* at 516*;* Commonwealth v. Durham, 446 Mass. 212 (2006).

[393] Commonwealth v. Adkinson, 442 Mass. 410, 417 (2004) (defendant has "right [to] an opportunity to interview prospective witnesses held in the custody of the Commonwealth," citing *Commonwealth v. Balliro, supra;* Commonwealth v. Durham, 446 Mass. 212 (2006).

[394] Commonwealth v. Carita, 356 Mass. 132, 143 (1969).

[395] Commonwealth v. Adkinson, 442 Mass. 410, 417-18 (2004).

[396] Id.

### 7. Psychiatric Examination of a Witness's Competency

By statute, the court may order that any party or witness be examined by a doctor or psychologist of the Department of Mental Health.[397] It is proper for a judge to order a complainant or other witness to undergo an examination for the purpose of determining *competency* to testify[398] but not in order to determine the witness's *credibility,* which is a jury function.[399]

The judge has broad discretion in deciding whether to order a witness to be examined for competency, but there are limits. The judge should not order a competency examination without an evidentiary hearing[400] or a sufficient basis.[401] On the other hand, a record of inconsistent identifications by a moderately retarded man has been held to require an examination for competency.[402]

### 8. Witness's History of Mental Health Treatment

If a witness has received mental health treatment before or following the alleged incident, treatment records might be sought which contain valuable impeachment evidence. But no authority exists clearly establishing the right to discover whether the witness has a treatment history and, if so, where and by whom. Counsel should, in appropriate cases, attempt to gather this information by investigation, informal discovery from the prosecutor, formal discovery requests, and other avenues.[403]

---

[397] G.L. c. 123, § 19, provides: "In order to determine the mental condition of any party or witness before any court of the commonwealth, the presiding judge may, in his discretion, request the department [of Mental Health) to assign a qualified physician or psychologist, who, if assigned shall make such examinations as the judge may deem necessary." Under this statute, it is improper to assign a psychiatrist selected by the defendant rather than the Department of Mental Health. Commonwealth v. Gibbons, 378 Mass. 766, 768 (1979).

[398] Commonwealth v. Widrick, 392 Mass. 884 (1984); Commonwealth v. Gibbons, 378 Mass. 766, 769 n.6 (1979) (citing Commonwealth v. Welcome, 348 Mass. 68, 69 (1964)). For a helpful explication of the elements of a thorough mental examination, *see Steps to Assure Competency of Mental Health Evaluations,* 5 Crim. Prac. Man. (BNA) 175, 207 (1991).

[399] Commonwealth v. Widrick, 392 Mass. 884, 889–91 (1984).

[400] Commonwealth v. Gibbons, 378 Mass. 766, 772–73 (1979) (if there are unsupported allegations of conflicting statements regarding competency, court should have voir dire, examine medical records, or hear from psychiatrist before ordering § 19 examination). However, a judge need not scrutinize the witness before *denying* an examination. Commonwealth v. Fillippini, 1 Mass. App. Ct. 606, 608–10 (1973). *See also* Commonwealth v. Laquer, 20 Mass. App. Ct. 965, *rev. denied,* 396 Mass. 1103 (1985) (judge who denied examination could limit his examination of psychiatric records to six-month period surrounding attack and identification, despite earlier mental illness).

[401] A witness is competent if he is aware of the duty to tell the truth, has personal knowledge of relevant facts, and has the capacity to perceive, remember, and recount. Psychiatric treatment per se does not render a person incompetent, nor does an uncorroborated assertion of mental illness. Commonwealth v. Gibbons, 378 Mass. 766, 770–71 (1979).

[402] Commonwealth v. Santos, 402 Mass. 775 (1988) (witness identified two white men as assailants at voir dire after telling police they were black).

[403] *See generally* Donovan, *Discovery Dilemmas Following* Commonwealth v. Bishop: *The Need for a Rule of Criminal Procedure Governing Discovery of Privileged Records*, MASS. L. REV. 94, 102–03 (Sept. 1995) (pointing out that treatment history is not privileged information, and arguing that the right to compulsory process under art. 12 and the Sixth Amendment may entitle a defendant to subpoena the witness to an evidentiary hearing in order to investigate the topic).

## 16.6G. POLICE REPORTS AND RECORDS

Rule 14(a)(1)(A)(vii) obligates the prosecution to provide automatic discovery of any "material and relevant police reports." This discovery is also mandated in district court cases by statute.[404] Apart from these requirements specifically directed at police reports, other provisions of Rule 14 require automatic discovery of police reports and statements if the police officer was a witness at the grand jury[405] or if the report consists of exculpatory evidence[406] or a defendant's statement.[407]

The prosecution has a duty to inquire as to the existence of discoverable evidence, and must insure that *all* relevant police reports are turned over.[408] Documents that may fall within the category of police reports, even though sometimes also constituting another category, may include: (1) an incident report concerning the crime, present in every case; (2) a motor vehicle accident report, including statements of the participants; this report may be available from the police or from the Department of Motor Vehicles because police departments must report accidents to the registry; (3) statements by individual officers, supplementing the incident report as well as all original police field or personal notes not included in official reports or statements;[409] (4) the defendant's statement; (5) witness statements;[410] (6) identification materials, such as line-up reports, identification photo displays, or identikit pictures; (7) a videotape of a confession or sobriety test; (8) a firearm discharge report; (9) daily logs, required by law and open to public inspection during regular business hours without charge;[411] (10) printouts of 911 calls, containing the time received, who called, and which car was sent; (11) turret tapes of 911 calls; (12) printouts of all incidents, arranged by complainant; (13) printouts of all arrests of the past year, arranged by arrestee and cross- referencing the incident report; (14) booking sheets; (15) the booking photograph, which freezes the defendant's appearance and dress at the time of arrest; (16) ambulance reports; (17) a medical examiner's report if there was a death in the case; (18) mandated reports for health care providers in cases of rape or wound treatment;[412] and (19) in the Boston Police Department, Field Interrogation and/or Observation Reports (F.I.O.).[413]

---

[404] G.L. c. 218, § 26A, ¶ 2.

[405] Mass. R. Crim. P. 14(a)(1)(A)(ii).

[406] Mass. R. Crim. P. 14(a)(1)(A)(iii).

[407] Mass. R. Crim. P. 14(a)(1)(A)(i).

[408] Commonwealth v. Frith, 458 Mass. 434 (2010); Commonwealth v. Laguer, 448 Mass. 585, 591 fn. 21, 593 (2008) (information in possession of detective who worked on investigation not sent to prosecutor, imputed to the Commonwealth).

[409] *But see* Commonwealth v. Burns, 43 Mass. App. Ct. 362 (1997) (discovery order to provide defendant, inter alia, with documents and statements in possession of police department, was, "absent meaningful argument to the contrary," held satisfied by detective who prepared and gave defendant a summary of his investigative notes, originally written on various "lined sheets . . . , napkins, [and] . . . any piece of scrap paper [the detective] had in his pocket," and who then destroyed original notes).

[410] *See* Commonwealth v. Wanis, 426 Mass. 639, 644 (1998) (on motion under Rule 17, judge should normally issue subpoena to police internal affairs division for statements of percipient witnesses, without special showing of relevance or need).

[411] G.L. c. 41, § 98F. This log is a record, in chronological order, of all responses to valid complaints received, all crimes reported, and the names, addresses, and charges of all arrestees. Under the statute, logs are public records available without charge unless otherwise provided by law. A 1991 amendment extends this requirement to college and university police departments.

[412] *See supra* § 11.3, and *infra* § 48.1A regarding mandated reports of child abuse to DSS.

[413] A Boston Police Department (B.P.D.) rule requires Boston police officer to carry F.I.O. report forms and to fill them out "whenever a known criminal is seen, or, when a person is suspected of having an unlawful design is observed during the Officer's tour of duty." B.P.D. Rules and Procedures, Rule 323, §§ 2–3 (April 7, 1980). The F.I.O. is meant to document threshold stops, frisks, and interrogations conducted by officers in the

*Internal Affairs Records:* In *Commonwealth v. Wanis,*[414] the Supreme Judicial Court clarified the procedure by which a defendant may obtain evidence from the internal affairs division of a police department. The defendant in *Wanis* had filed a complaint with the Boston Police Department against one of the officers who had arrested him. The internal affairs division then took statements from percipient witnesses which the defendant sought. In an important general holding, the Court concluded that an order to produce such statements is "generally appropriate in criminal cases."[415] The Court held, inter alia, (1) that a prosecutor who does not have access to internal affairs records is not properly subject to a motion under Mass. R. Crim. P. 14 for the production of these records; (2) however, a prosecutor who has possession or control of internal affairs investigative records must review that material in response to a Rule 14 motion for disclosure of exculpatory facts;[416] (3) a pretrial motion may be filed under Mass. R. Crim. P. 17(a)(2) seeking a summons for the production of documents and other objects by the keeper of the records of an internal affairs division;[417] (4) the internal affairs division can move to quash or modify such a subpoena, thereby placing before a judge the lawfulness of the command to produce and other issues, such as its reasonableness and whether balancing policy considerations against a defendant's right of confrontation, the subpoena should be honored, restricted, or modified in some way, or quashed; and (5) on motion pursuant to Rule 17, a judge should normally issue a subpoena to the internal affairs division directing it to produce statements received by it from percipient witnesses (including police officers) to events occurring at the time of the alleged crime or crimes and the defendant's arrest; no special showing of relevance or need is required for the production of such statements.[418]

A defendant who seeks records of an internal affairs division investigation beyond the statements of such percipient witnesses should follow the *Wanis* procedure, but, if production is opposed, must also show a "good faith, specific, and reasonable basis for believing that any such record contains exculpatory evidence that might be a real benefit to the defense."[419] The trial judge's decision is a matter of discretion, but is bound by the Supreme Judicial Court's standards and "constitutional limits."[420]

---

field. *See* B.P.D., Special Order No. 91-10, "Use of Field Interrogation and/or Observation Report to Document Threshold Inquiry Activities." Copies of the F.I.O. are required to be kept on file in both central and field offices. Although the Department considers these reports "confidential," in particular cases they could contain exculpatory information, and thus be subject to discovery. However, it is unclear whether police officers actually comply with the rule's requirement to record and file these reports on field investigations that do not result in arrest. Although B.P.D. arrest reports commonly state that an officer "F.I.O.'d" and individual, this might mean only that the officer conducted an investigation without completing an F.I.O. report form.

[414] Commonwealth v. Wanis, 426 Mass. 639 (1998). *See also* Commonwealth v. Rodriguez, 426 Mass. 647 (1998), a companion case.

[415] Commonwealth v. Wanis, 426 Mass. 639, 640 (1998).

[416] Commonwealth v. Wanis, 426 Mass. 639, 644 (1998).

[417] Although the S.J.C. envisions filing of a defense motion, nothing in Rule 17 appears to require it. Under the Rule, presumably, counsel could serve a summons without prior court approval, and await a motion to quash from the summonsed party. However, if counsel expects resistance to the summons, proceeding first by motion might expedite the process.

[418] Commonwealth v. Wanis, 426 Mass. 639, 644 (1998); Commonwealth v. Rodriguez, 426 Mass. 647, 649 (1998).

[419] Commonwealth v. Rodriguez, 426 Mass. 647, 648–50 (1998) (defendant entitled to obtain internal affairs records of statements of percipient witnesses to circumstances relating to crimes with which he has been charged, but failed to make required showing as basis for production of statements concerning postarrest events). *Compare* showing required under Commonwealth v. Fuller, 423 Mass. 316, 226–27 (1996), discussed *supra* at § 16.3C.

[420] Commonwealth v. Wanis, 426 Mass. 639, 645 (1998).

The issue of summonsing records in the hands of third parties is discussed in detail *supra* at § 16.3C.

## 16.6H. PHYSICAL EVIDENCE AND SCIENTIFIC TESTS; INDEPENDENT DEFENSE TESTING [421]

### 1. Discovery of physical evidence and tests

Rule 14(a)(1)(A)(vii) obligates the prosecutor to provide automatic discovery of, *inter alia*, any relevant photographs, tangible objects, intended exhibits, and reports of physical examinations or scientific tests or experiments.[422] Regarding the latter, any such reports must be disclosed, whether intended for trial or not. Expert opinion evidence concerning such reports is discoverable under subdivision (vi), discussed *infra* at § 16.6I.

In district courts, discovery of the above items is also statutorily mandated.[423]

Sanctions, including exclusion of the evidence, may be levied for failure to comply.[424]

### 2. Independent testing

A line of cases establishes that the defendant may independently test physical evidence as a matter of right,[425] at least when it is in the possession or control of the Commonwealth.[426] As the courts have noted, the right to present a defense depends on "what might loosely be called the area of constitutionally guaranteed access to evidence."[427] Moreover, the logic of the cases requiring equal access to Commonwealth witnesses should apply just as well to defense access to physical evidence,

---

[421] *See also supra* Ch. 12, regarding forensic evidence.

[422] Mass. R. Crim. P. 14(a)(1)(vii); *See also* Commonwealth v. Williams, 456 Mass. 857 (2010) (Myspace messages in which defendant's brother allegedly contacted witnesses required to be disclosed as intended exhibits under Rule 14(a)(1)(vii)); Commonwealth v. Felder, 455 Mass. 359 (2009) (photographs of footprints at crime scene required to be turned over under Rule 14(a)(1)(vii)).

[423] G.L. c. 218, § 26A, ¶ 2.

[424] *See* Commonwealth v. Frith, 458 Mass. 434 (2010).

[425] Commonwealth v. Neal, 392 Mass. 1, 10 (1984); Commonwealth v. Nicholson, 20 Mass. App. Ct. 9, 16 n.4 (1985) ("Fairness certainly requires giving defense counsel prompt access to all material and information in the possession of the Commonwealth and permitting tests of such materials to be conducted, at public expense if necessary"). *Cf.* Commonwealth v. Gliniewicz, 398 Mass. 744, 746–49 (1986) (new trial ordered where prosecution testing of a boot destroyed the defendant's ability to conduct an independent test, in violation of a pretrial conference agreement).

When a defendant makes a preliminary showing that insanity is an issue, due process requires a state to provide access to a psychiatrist if the defendant cannot afford one. Ake v. Oklahoma, 470 U.S. 68 (1985); Bush v. McCollum, 231 F. Supp. 560 (1964). *See also* Commonwealth v. Cosme, 398 Mass. 1008 (1986). For a helpful explication of the elements of a thorough mental examination (albeit in a sanity, not competency, context), *see Steps to Assure Competency of Mental Health Evaluations,* 5 Crim. Prac. Man. (BNA) 175, 207 (1991).

An indigent defendant has a further right to funds for independent testing. *See supra* § 8.4B.

[426] In Commonwealth v. Jackson, 388 Mass. 98, 106–07 (1983), the court upheld the trial court's denial of a motion to compel the prosecutor to produce a Commonwealth witness's hair sample. It found no right under the confrontation clause or under the *Balliro* "access to witness" case law to compel the Commonwealth to obtain evidence from independent third parties. *But see* ABA Standards for Criminal Justice: Discovery and Procedure Before Trial, Standard 11-4.8(a) (Approved draft, 1978) (court may order third parties to appear in deposition, submit to scientific and identification tests, or permit party to review document).

[427] California v. Trombetta, 467 U.S. 479, 485 (1984) (Sixth Amendment right); Commonwealth v. Balliro, 349 Mass. 505 (1965) (art. 12 right).

whether for inspection or scientific examination.[428] However, in cases involving the destruction of breathalyzer ampoules, the courts have found that this right is satisfied by the statutory right to an independent blood test, since this permits the defendant a "right of access to scientific evidence" with which to dispute the Commonwealth's findings.[429]

This issue arises in two contexts: a discovery motion for independent testing of evidence, and loss or destruction by the Commonwealth of evidence, which is addressed *supra* at § 16.6B.

Even if the prosecution is cooperative, gaining access to evidence in police possession for defense testing will reveal the fact of the defendant's development of scientific evidence and often the identity of the defense expert, underscoring the importance of a confidentiality agreement with the expert.[430]

## 16.6I. EXPERT OPINION EVIDENCE

Rule 14(a)(1)(A)(vi) obligates the prosecution to provide automatic discovery of its intended expert opinion evidence (unless the opinion evidence pertains to the defendant's criminal responsibility or mental condition, which is exclusively governed by Rule 14(b)(2), addressed *infra* at § 16.7B[431]). The rule requires the Commonwealth to disclose "the identity, current curriculum vitae, and list of publications of each intended expert witness, and all reports prepared by the expert that pertain to the case."[432] In providing this discovery, the Commonwealth should explicitly designate that the witness is to be qualified as an expert.[433] This provision is limited to intended expert witnesses, and does not apply to experts whose testimony or reports are not intended for use at trial. In district courts, this discovery is also a matter of statutory right.[434]

With regard to *ballistics experts*, the SJC now requires a ballistics expert to "adequately document the findings or observations that support the examiner's ultimate opinion, and this documentary evidence, whether in the form of measurements, notes, sketches, or photographs, shall be provided in discovery so that the defense counsel will have an adequate and informed basis to cross-examine the forensic ballistics expert at trial."[435]

---

[428] *See supra* § 16.6F(6).

[429] California v. Trombetta, 467 U.S. 479 (1984); Commonwealth v. Neal, 392 Mass. 1, 8–9, (1984).

[430] *See supra* § 12.2C.

[431] Mass. R. Crim. P. 14(a)(1)(vi); Commonwealth v. Sliech-Broduer, 457 Mass. 300, 319 (2010)(Rule 14(a) does not apply to discovery related to the defense of lack of criminal responsibility because all procedures and provisions applicable to such discovery are in 14(b)(2)).

[432] Mass. R. Crim. P. 14(a)(1)(vi).

[433] Commonwealth v. Iago I., 77 Mass. App. Ct. 327 (2010); Commonwealth v. Vasquez, 78 Mass. App. Ct. 660 (2011) (better practice is for the Commonwealth to expressly identify each expert witness it intends to call, and to make such witness's curriculum vitae and other required documentary material available to the defendant without prior request). However, where the Commonwealth has already disclosed the expert's reports, the defendant has cross-examined the expert, and the judge has allowed the witness to testify as an expert in two pre-trial hearings, the omission of the "expert" designation on the witness list is not likely to result in exclusion of the expert's testimony.

[434] MGL c. 218 s. 26A.

[435] Commonwealth v. Pytou Heang, 458 Mass. 827 (2011). *See also* U.S. v. Green, 405 F.Supp.2d 104 (D. Mass. 2005) (absence of notes and photographs by examiner "makes it difficult" if not impossible for another expert to reproduce what ballistics examiner did).

If the expert's testimony will differ from the pre-trial report produced to the defense, the Commonwealth must notify the defense.[436]

Sanctions may be applied in response to non-disclosure or delayed disclosure[437] of an expert witness.[438]

A summary of forensic techniques appears *supra* at ch. 12.

## 16.6J. DISCLOSURE OF IDENTIFICATION PROCEDURES

The Commonwealth is required to turn over "a summary of identification procedures, and all statements made in the presence of or by an identifying witness that are relevant to the issue of identity or to the fairness or accuracy of the identification procedures."[439] This provision was added in 2004 to reflect existing case law, which had found that the due process right to fair identification procedures "would mean little if it did not carry with it the right to be informed of the details of any out-of-court identification, even if it were not used at trial."[440] Although not mentioned in the subdivision, all tangible objects relating to identification procedures, such as photographs and identikits, should also be produced, both under this provision and subdivision (a)(1)(A)(viii), providing discovery of tangible objects, tests, and statements of intended witnesses. Beyond this automatic discovery, in some cases counsel may wish to move for a voir dire hearing on identification procedures because written discovery may be unable to provide a full and accurate account.[441]

There are other bases for discovery of identification procedures. Such discovery is statutorily mandatory in district court or the BMC upon motion.[442] Additionally the *Brady* constitutional right to exculpatory evidence, and Rule 14(a)(1)(A)(iii)'s codification of this right, require the state to inform the defendant if another person was identified,[443] the witness failed to identify the defendant,[444] an ill-

[436] Commonwealth v. Smith, 450 Mass. 395 (2008)(Commonwealth's ballistician testified on cross-examination that bullet found in victim could have come from .9 millimeter weapon, but in report stated that bullet was a partial .380 bullet). However, where the Commonwealth is surprised by the change in testimony as evidenced by the questions asked on direct examination, the Commonwealth has not violated their duty to disclose a change in testimony. *Id.*

[437] Cf. Commonwealth v. Nolin, 448 Mass. 207, 223 (2007)(delayed disclosure of expert witness need not result in the exclusion of their testimony where funds were provided for the defendant to hire his own expert, voir dire of the expert was taken, and a delay of several days was granted to allow defense counsel to prepare.

[438] Mass. R. Crim. P. 14(c), discussed *supra* at § 16.4B.

[439] Mass. R. Crim. P. 14(a)(1)(A)(viii).

[440] Commonwealth v. Dougan, 377 Mass. 303, 316 (1979). *See also* Commonwealth v. Clark, 378 Mass. 392, 403 (1979)(defendant has right to discover whether witness previously failed to identify him). However, earlier cases prior to the 2004 revision of Rule 14 had also held that the defendant is not entitled to all photographs of others that were displayed in the absence of any showing that the procedure was suggestive. Commonwealth v. Brown, 376 Mass. 156, 161–64 (1978); Commonwealth v. Clark, 378 Mass. 392, 402 (1979); nor to the photograph of another person chosen as "resembling" the culprit where no showing was made that the photograph did not resemble the defendant. Commonwealth v. Walker, 14 Mass. App. Ct. 544, 549–50 (1982).

[441] *See* Commonwealth v. Dougan, 377 Mass. 303 (1979). However, a voir dire hearing is not constitutionally required in every case under the U.S. Constitution, although it may be advisable or constitutionally required in some circumstances. Watkins v. Sowders, 449 U.S. 341 (1981) *Compare* Nassar v. Vinzant, 519 F.2d 798, 802 n.4 (1st Cir. 1975) (voir dire is 'eminently sensible,"); Commonwealth v. Simmons, 383 Mass. 46, 47 (1981) (voir dire hearing is "the better course").

[442] G.L. c. 218, § 26A, ¶ 2.

[443] Cannon v. Alabama, 558 F.2d 1211 (5th Cir. 1977), *cert. denied,* 434 U.S. 1087 (1978). *Cf.* Commonwealth v. Roberts, 362 Mass. 357. 360–63 ((1970) (nondisclosure of witness's identification of another;

fitting description was given,[445] the witness described the culprit inconsistently,[446] or did not come forward with an identification until significantly after the crime.[447] Finally, although not themselves identification procedures, automatic discovery of physical evidence and scientific reports under subdivision (a)(1)(A)(vii) is often relevant to identification cases because they may be used to deduce the identity of the culprit.

*Motion for exculpatory evidence of others who fit the description:* The Boston Police Department and many others maintain a "Computer Video Identification Unit" which can yield suspects based on a submitted description. CPCS has suggested that defense counsel in identification cases consider a "Motion to Compel the Commonwealth to Provide Exculpatory Evidence," which would require the police department to run the culprit's description through the computerized database and produce other possible suspects.

## 16.6K. SURVEILLANCE

Two discovery motions should be considered when surveillance may have occurred. First, the defendant might move for disclosure of whether he was subject to electronic or other surveillance, and, if so, for disclosure of all its fruits.[448] Second, a motion might seek the manner, means, time, and place of the surveillance.

In some cases of visual or electronic surveillance, evidence may have been obtained from a secret location. Often the location will be crucial, because a major question will be whether the officers could see or hear what they claim to have observed. While there is a limited privilege against disclosure where it would compromise present or future identifications, the Supreme Judicial Court has found that a surveillance location should have been revealed in a case that rested on the officer's credibility and there was no corroboration offered by the prosecution.[449] The court applies the same balancing test used to determine whether an informant's identity should be disclosed and must reveal the information when it may be relevant and helpful to the accused's defense.[450] And as in the informant situation, the test

since no defense request for the information, the higher materiality standard applies and defendant did not show that nondisclosure was sufficiently likely to have altered result).

[444] United States ex rel. Meers v. Wilkins, 326 F.2d 135 (2d Cir. 1964); Commonwealth v. Clark, 378 Mass. 392, 403 (1979).

[445] Frezzell v. United States, 380 A.2d 1382, 1385 (D.C. 1977), *cert. denied,* 439 U.S. 931 (1978). *See also* Jackson v. Wainwright, 390 F.2d 288 (5th Cir. 1968).

[446] Commonwealth v. Daniels, 445 Mass. 392 (2005).

[447] *Id.*

[448] Regarding the state's duty to disclose pretrial wiretap recordings under G.L. c. 272, § 99 0 1, *see* Commonwealth v. Angiulo, 415 Mass. 502, 516–18 (1993) (disclosure duty does not apply to recordings lawfully obtained under federal law). The ABA Standards for Criminal Justice: Discovery and Procedure Before Trial, Standard 11-2.1(b)(ii), would require the prosecutor to disclose surveillance information on defense request. Under G.L. c. 272, § 99 0 1, the state must provide copies of all wiretap recordings made under the statute at least 30 days prior to trial, although it has no disclosure duty regarding recording lawfully obtained under federal law. Commonwealth v. Angiulo, 415 Mass. 502, 516–18 (1993).

[449] Commonwealth v. Lugo, 406 Mass. 565, 569–74 (1990).

[450] Commonwealth v. Lugo, 406 Mass. 565, 570–72 (1990). *See also* Commonwealth v. Grace, 43 Mass. App. Ct. 905, 906 (1997) (defendant has affirmative preliminary "obligation to show exception to the privilege" by showing that disclosure of the information would provide material evidence needed to present his case to jury; he need not make "specific showing of just what the evidence would have proved and how far he [would be] prejudiced by the withholding," but it is not enough simply to claim a need to know (quoting Commonwealth v. Johnson, 365 Mass. 534, 547 (1974), and Commonwealth v. Swenson, 368 Mass. 268, 276 (1975); Commonwealth v. Rios, 412 Mass. 208, 209 (1992) (under Massachusetts confrontation clause of art. 12, judge

distinguishes between a demand for pretrial disclosure to assert an illegal search or arrest claim, and a demand for disclosure at trial where the issue is guilt or innocence.[451] This balancing test is more fully discussed supra at § 16.6F(5) (disclosure of informants).

### 16.6L. "ANY MATERIAL AND RELEVANT EVIDENCE."

This catch-all phrase does not appear in Rule 14, but in district court, a statute requires the court, upon a defense motion, to order the prosecution to provide discovery of "any material and relevant evidence [and] documents."[452] Therefore, as the Reporter's Notes to Rule 14(a)(1)(A)(vii) note, "the Commonwealth's mandatory discovery obligation remains broader in district courts than in courts where § 26A does not apply. Nevertheless, the items included in this subdivision are likely to exhaust the Commonwealth's evidence in many cases and therefore obviate the need for filing motions to obtain further discovery in those cases."

# PART III: PROSECUTORIAL DISCOVERY

## § 16.7 AREAS OF PROSECUTORIAL DISCOVERY

Mass. R. Crim. P. 14 mandates several procedures providing for discovery to the prosecutor. Rule 14(a)(1)(B) provides automatic, reciprocal discovery without motion of much of the defendant's intended evidence. Rule 14(b) sets out special procedures for notice, and in some cases discovery, of defenses based on alibi, mental health, self-defense, and "license, claim of authority, ownership, or exemption." These provisions are quite broad and some had only been hinted at in prior case law.[453] After detailing the authorized areas of prosecutorial discovery, we analyze important constitutional and statutory limitations that provide some protection to the defendant.

The following section covers those methods of prosecutorial discovery authorized by Rule 14. But counsel should also be on the lookout for other rulings which have as a by-product illegitimate prosecutorial discovery. For example, the Supreme Judicial Court found it improper to have a defense witness testify first in voir dire, outside the jury's presence, for the alleged purpose of determining his relevance, because "the Commonwealth was given untoward discovery of the witness' statements immediately prior to examination."[454] Similarly, motions for indigent summons or fees for experts may provide unauthorized prosecutorial discovery unless steps are taken to safeguard against it.

---

may not "straddle the fence" and allow defense counsel to question police on location of surveillance location but exclude defendant from courtroom during this testimony); Commonwealth v. Hernandez, 421 Mass. 272, 276 (1995).

[451] Commonwealth v. Lugo, 406 Mass. 565 (1990).

[452] M.G.L. c. 218, s. 26A par. 2.

[453] *See, e.g.,* Commonwealth v. Blodgett, 377 Mass. 494 (1979); Commonwealth v. Edgerly, 372 Mass. 377 (1977); Blaisdell v. Commonwealth, 372 Mass. 753 (1977); Commonwealth v. Lewinski, 367 Mass. 889 (1975).

[454] Commonwealth v. Beauchemin, 410 Mass. 181 (1991).

## 16.7A. RECIPROCAL DISCOVERY TO PROSECUTION

As revised in 2004, Rule 14(a)(1)(B) requires the defendant to provide automatic discovery to the prosecution of (1) the names, addresses, dates of birth, and statements of its intended witnesses, and (2) every relevant item described in subdivisions (a)(1)(A) (vi), (vii), and (ix) that it intends to use at trial. These subdivisions include intended exhibits and photographs, intended expert opinion evidence, reports of physical examinations, and any promises, rewards, or inducements offered to defense witnesses. Note that although entitled "reciprocal discovery," the two parties' obligations are asymmetrical: the defense obligation is limited to items it intends to offer at trial (or in the case of witness statements, who it intends to call), whereas the prosecution must turn over some evidence it may intend not to use, and in the case of exculpatory evidence, is constitutionally required to do so. The limitation on prosecutorial discovery to the defendant's intended evidence is constitutionally required by the privilege against self-incrimination.[455] Note that the automatic discovery regime excludes some items of intended evidence that can be constitutionally sought by motion.[456]

*Regarding statements of the defendant's intended witnesses,* automatic discovery is limited to the defendant's *own* witnesses, and excludes statements of Commonwealth witnesses.[457] It may be that the defendant intends to use the statement of a Commonwealth witness to impeach him, but to obtain such statements, the Commonwealth would have to move for discovery of them under 14(a)(2).[458]

*Regarding intended expert opinions evidence,* the automatic reciprocal discovery provision does not apply to one type of intended expert opinion evidence – that of expert evidence regarding the defendant's sanity or mental condition.[459] As to other expert opinion evidence which *is* subject to this rule, failure to disclose it may result in the exclusion of the expert's testimony.[460] However, exclusion of an expert is not always required where there is a lesser sanction available and the testimony is critical to an element of the case.[461] Before exclusion of an undisclosed expert is ordered, a judge may

[455] Williams v. Florida, 399 U.S. 78 (1970).

[456] In Commonwealth v. Durham, 446 Mass. 212, 220 (2006), the Court held that while *automatic* discovery does not extend to statements that the defense intends to use for purposes of cross-examination, but only to statements of witnesses they intend to call, the latter discovery may be sought and allowed by motion without running afoul of constitutional prohibitions, on the basis that the defense intended to use the statements if not call the witness.

[457] Mass. R. Crim. P. 14(a)(1)(B)(enumerating "statements of those persons whom the defendant intends to call as witnesses at trial").

[458] *See* Commonwealth v. Durham, 446 Mass. 212, 220 (2006), which notes that the "revised Reporters' Notes merely reiterate that *automatic* discovery does not extend to statements that the defense intends to use for purposes of cross-examination, and that automatic discovery of witness statements is the same for both sides-they must each produce the statements of the witnesses they intend to call….The Notes …make clear that any such discovery requires a motion, and that it does not come within the category of automatic discovery." *Cf.*. Commonwealth v. Reynolds, 429 Mass. 388 (1999)(enforcing pretrial agreement to turn over such impeaching statements).

[459] Mass. R. Crim. P. 14 (a)(1)(B).

[460] Commonwealth v. Babb, 77 Mass. App. Ct. 1116 unpublished opinion WL 3218907(2010) (expert testimony excluded where defense counsel represented to court on first day of trial that he would not call expert but changed his mind on second day of trial and attempted to introduce expert testimony). Babb finds at least two reasons supporting the exclusion of undisclosed expert testimony. First, the court must disclose the list of expected witnesses to the jury pool to ensure they will not be biased by a personal relationship with an intended witness. Second, once the jury is empaneled and testimony is taken, the judge is not in a position to grant the Commonwealth a continuance to investigate a potential expert.

[461] Commonwealth v. Paiva, 71 Mass. App. Ct. 411 (2008). The judge should balance the need for an orderly trial process in conformity with pretrial rules and agreements, including possible prejudice to the Commonwealth with the right of the defendant to defend himself against the charges.[461] Factors which must be

consider ordering a written summary of the proposed testimony of the witness, allowing the prosecutor to interview the witness, ordering a brief recess, and allowing the Commonwealth to recall it's witness to rebut the undisclosed expert's testimony.[462]

*Timing*: The rule obligates the defendant to provide this discovery, but only after the Commonwealth has delivered all required discovery to the defense – a prerequisite that is constitutionally required.[463] After the prosecution has done so and filed a Certificate of Discovery, and by a date agreed to by the parties or ordered by the court, the defense must provide the prosecution with the automatic discovery items specified.[464] But because the defendant may not decide to use certain evidence until after this point, and disclosure is limited to intended evidence, the obligation may not develop until a later time.[465]

## 16.7B. INSANITY AND OTHER MENTAL HEALTH ISSUES

### 1. Defendant's Notice of Intent to Rely on Mental Health Issue

Under Rule 14(b)(2), a defendant who intends to rely at trial on a defense or other claim based on his mental health must provide notification of the following facts to the Commonwealth within the time provided for the filing of pretrial motions: (1) whether he intends to offer testimony of expert witnesses on the issue of his mental condition, (2) the names and addresses of any such expert witnesses, and (3) whether expert witnesses will rely on statements of the defendant as to his mental condition.[466] The defendant can then in some circumstances be ordered to undergo psychiatric examination subject to several requirements listed *infra.*

Rule 14(b)(2)(B) is designed to protect a defendant's rights while also allowing the Commonwealth advanced notice of complex mental health issues that the defendant intends to raise as part of his or her defense.[467] Originally (b)(2) applied only to the defense of insanity, but a 2012 amendment, reflecting case law, makes clear that its provisions apply to all defense claims based on mental impairment, including a defense of diminished capacity as well as insanity,[468] defenses based on

---

taken into account in assessing such a balance include: (1) prevention of surprise; (2) evidence of bad faith in the violation of the conference report; (3) prejudice to the other party caused by the testimony; (4) the effectiveness of less severe sanctions; and (5) the materiality of the testimony to the outcome of the case. Id. at 414-15.

[462] Commonwealth v. Paiva, 71 Mass. App. Ct. 411, 416 (2008).

[463] Wardius v. Oregon 412 U.S. 470 (1973)(due process requires prosecutorial discovery to be conditioned on reciprocal discovery to the defendant of the same items).

[464] Mass. R. Crim. P. Rule 14(a)(1)(B).

[465] See infra § 16.8A.

[466] Mass. R. Crim. P. 14 (b)(2)(A). This criminal rule is in large part a codification of the practice established by the S.J.C. in Blaisdell v. Commonwealth, 372 Mass. 753, 767 (1977) (state may constitutionally require advance notice of an intended insanity defense).

[467] Commonwealth v. Sliech-Broduer, 457 Mass. 300, 324 (2010).

[468] The two issues are distinct. Apart from differences in content, "insanity" provides an affirmative defense to the charge even if all the elements of the crime are present, while evidence of mental impairment may also or instead be used to casts doubt on an element the Commonwealth is requirement to prove – mens rea. The latter is often labeled a "diminished capacity defense", although it is not strictly a defense but evidence against the Commonwealth's case-in-chief. *See* Commonwealth v. Diaz, 431 Mass. 822, 828-29 and 828 n. 4 (2000)(distinguishing the two, in a case where the defendant asserted mental incapacity to premeditate); Commonwealth v. Contos, 435 Mass. 19, 24 n.7 (2001)(mental impairment evidence of inability to premeditate); Commonwealth v. Baldwin, 426 Mass. 105, 106 n. 1 (1997)(re diminished capacity).

battered woman syndrome,[469] a suppression motion based of the invalidity of a waiver,[470] a claim of incompetency to stand trial,[471] etc. Other kinds of expert witness reports are reciprocally discoverable under subsections (a)(1)(vi) and (a)(1)(B), but those provisions are explicitly inapplicable to expert testimony regarding mental impairment, where only Rule 14(b)(2) controls the production of information.[472]

### 2. Court-Ordered Examination

*Constraints imposed by the privilege against self-incrimination.* The privilege against self-incrimination limits the state's ability to order a psychiatric examination of the defendant because it is a form of "compelled testimonial production."[473] Nor may the state require the defendant to submit to a psychiatric examination as a prerequisite to raising the defense, since the defendant cannot be required to choose between the constitutional right to a determination of his criminal responsibility and the constitutional privilege against self-incrimination.[474] Thus, the state's power to require the defendant to submit to a psychiatric examination depends on finding a "constitutionally adequate grant of immunity or a valid waiver of the privilege."[475] In Massachusetts, when the defendant intends to present experts whose testimony is based on a statement of the defendant's, the court considers the defendant's privilege partially waived, to the extent that he may be forced to submit to a court-appointed psychiatrist's examination.[476] Because psychiatric evidence requires time to prepare, examination before trial is considered necessary and justified based on the defendant's intended waiver, but the fruits of the interview must be impounded until the defendant formally waives the privilege at trial.[477]

Rule 14(b)(2) reflects these limitations. "When a defendant serves notice that she will call an expert witness to testify about her mental condition at the time of the crime based on her testimonial

[469] Commonwealth v. Ostrander, 441 Mass. 344, 355 (2004)(dicta).

[470] Commonwealth v. Ostrander, 441 Mass. 344, 352 (2004).

[471] Seng v. Commonwealth, 445 Mass. 536, 546 (2005).

[472] Mass. R. Crim. P. 14(a)(1)(A)(vi); Commonwealth v. Sliech-Broduer, 457 Mass. 300, 320 (2010)(Rule 14(b)(2) "is intended to serve as the single, self-contained, and comprehensive rule governing pretrial notice and discovery from expert witnesses concerning a lack of criminal responsibility defense").

[473] Blaisdell v. Commonwealth, 372 Mass. 753, 758, 760 (1977). *See also* Seng v. Commonwealth, 445 Mass. 536 (2005); Commonwealth v. Baldwin, 426 Mass. 105 (1997); Commonwealth v. Wayne W., 414 Mass. 218, 228–30 (1993) (juvenile court transfer hearing). *Cf.* Buchanan v. Kentucky, 483 U.S. 402, 422–23 (1987); Estelle v. Smith, 451 U.S. 454 (1981) *(Miranda* applies).

[474] Pate v. Robinson, 383 U.S. 375 (1966). See also Drope v. Missouri, 420 U.S. 162 (1975); Commonwealth v. Laliberty, 373 Mass. 238 (1977); Commonwealth v. Barnes, 399 Mass. 385 (1987).

[475] Commonwealth v. Baldwin, 426 Mass. 105, 109 (1997).

[476] Commonwealth v. Wayne W., 414 Mass. 218, 230–32 (1993) (despite juvenile's statutory burden in Part B of transfer hearing to produce evidence of her mental state to rebut presumption of dangerousness and non-amenability to rehabilitative treatment, the choice to offer expert psychiatric testimony constitutes "voluntary" waiver of privilege); Commonwealth v. Trapp, 396 Mass. 202, 212 (1985); Commonwealth v. Callahan, 386 Mass. 784, 789 (1982) (citing Commonwealth v. Goulet, 374 Mass. 404, 411 n.4 (1978)); Blaisdell v. Commonwealth, 372 Mass. 753, 767 (1977). Notice of intent to defend by insanity does not waive the privilege because insanity can be proved in many ways without the defendant's testimony. Commonwealth v. Harvey, 397 Mass. 803 (1986); *Blaisdell supra,* 372 Mass. at 764–65. *Cf.* Buchanan v. Kentucky, 483 U.S. 402. 422–23 (1987) (psychiatric testimony based on defendant's compelled interview inadmissible unless defendant presents psychiatric evidence).

[477] Commonwealth v. Callahan, 386 Mass. 784, 789 (1982); Blaisdell v. Commonwealth, 372 Mass. 753, 758, 767 (1977).

statements, the rule *only* authorizes a court-ordered psychiatric examination of the defendant by the Commonwealth's expert, and nothing more."[478] The following provisions regulate when and how a court-ordered examination may take place:

*1. When an examination may be ordered:* The court is authorized to order a psychiatric examination of the defendant only if defense expert witnesses will rely on statements of the defendant as to his mental condition or criminal responsibility.[479] If the defendant will interpose such a defense in any other fashion, the court may not order a psychiatric examination.[480] The examination is governed by statute[481] as well as by Rule 14. Counsel should consider requesting the judge to require an electronic recording of the examination, or to permit defense counsel to be present. Both matters are within the judge's discretion.[482]

Rule 14(b)(2) does not apply to a defense of intoxication,[483] or to a sexually dangerous persons proceeding under G.L. c. 123A where two examiners have examined a defendant and concluded he is not a sexually dangerous person.[484]

*2. Content of expert's report:* In *Commonwealth v. Sliech-Broduer*, the SJC requested its Standing Advisory Committee on the Criminal Rules to propose an amendment to Rule 14(b)(2) reflecting the new requirement that the defendant's expert produce to the prosecution a report that includes the defense expert's opinion and bases and reasons for the opinion.[485] As revised in 2012, subsection (b)(2)(B)(iii) requires both side's mental health expert to include in their reports:

a written summary of the expert's expected testimony that fully describes: the defendant's history and present symptoms; any physical, psychiatric, and psychological tests relevant to the expert's opinion regarding the issue of mental condition and their results; any oral or written statements made by the defendant relevant to the issue of the mental condition for which the defendant was evaluated;[486] the expert's opinions as to the defendant's mental condition, including the bases and reasons for these opinions; and the witness's qualifications."

---

[478] Commonwealth v. Sliech-Broduer, 457 Mass. 300, 318 (2010).

[479] Mass. R. Crim. P. 14(b)(2)(B); Blaisdell v. Commonwealth, 372 Mass. 753 (1977)(insanity); Commonwealth v. Diaz, 431 Mass. 822, 829-830 (2000)(mental impairment defense to mens rea – inability to premeditate). Where a court-appointed expert determines a defendant is not competent to stand trial, the Commonwealth may request and a judge may order a second competency exam to be performed by an expert of the Commonwealth's choosing. Seng v. Commonwealth, 445 Mass. 536, 538 (2005).

[480] Blaisdell v. Commonwealth, 372 Mass. 753 (1977).

[481] G.L. c. 123, § 15.

[482] Commonwealth v. Baldwin, 426 Mass. 105, 110–13 (1997) (denial of motion to audiotape examination or to allow counsel's presence did not violate defendant's rights; defense may cross-examine as to why accurate record of psychiatric interview was not made) (citing Commonwealth v. Trapp, 423 Mass. 356, 359 (1996), and Commonwealth v. Delaney, 404 Mass. 1004, 1005 (1989)). The S.J.C. has said that "videotaping might be a sound idea." Baldwin, *supra,* 426 Mass. at 110 (quoting *Trapp, supra,* 423 Mass. at 359*).*

[483] Reporter's Notes to Rule 14(b)(2).

[484] Seng v. Commonwealth, 445 Mass. 536, 539 (2005), citing Commonwealth v. Poissant, 443 Mass. 558 (2005).

[485] Commonwealth v. Sliech-Broduer, 457 Mass. 300, 325 (2010).

[486] As to the defendant's statements, the Reporter's Notes to the 2012 amendment state that they include "both statements relating to the underlying incident as well as any statements prior to or following it that are relevant to the defendant's mental condition. If the examiner considered written statements of the defendant, the report should contain the relevant portions. If the examiner considered oral statements of the defendant, the report should include the substance of what the defendant said that bears on the question of his or her mental condition. In reporting on the defendant's statements, examiners should not withhold relevant evidence contrary to their own position."

*3. Sealing of the report; timing of disclosure:* Under Rule 14(b)(2) any "statement, confession, or admission, or other evidence of or obtained from the defendant during the examination" may not be disclosed to the "prosecutor or anyone acting on his behalf unless so ordered by the judge."[487] The examiner must file a report with the court, which is sealed and not available to the parties unless (a) the court determines that it contains "no matter, information or evidence which is based upon statements of the defendant as to his mental condition at the relevant time or which is otherwise within the scope of the privilege against self-incrimination"; *or* (b) the defendant moves that it be made available to the parties; *or* (c) the defendant has expressed a clear intent to raise as an issue her mental condition, and the judge is satisfied that the defendant will testify or will offer expert testimony based on the defendant's statements as to his mental condition.[488]

The Reporter's Notes state that "in order to avoid infringing on the defendant's privilege against self-incrimination, the defense expert's report is released to the prosecution at the same time that the defendant receives the report of the Commonwealth's expert."[489] Unless the parties agree to an earlier time for disclosure, this mutual exchange is to take place no later than when the defendant's "clear intent" is manifested.[490] Once the reports have been released to the parties, they may be shared with the respective experts for each side.

Unprivileged matter in the report may be made available at any time to the parties.[491] If the judge is uncertain whether any information in the report falls within the scope of the privilege, she can review the material in camera with defense counsel alone.[492]

*4. Use at trial:* In effect, the above provisions mean that the defendant may open the door to admission of otherwise inadmissible psychiatric testimony if he testifies on his own behalf or calls his own expert psychiatric witnesses who will rely on their interviews with him. But even then, by statute no statement by the defendant in a court-ordered psychiatric examination is admissible against him "on any issue other than that of his mental condition, nor shall it be admissible in evidence against him on that issue if such statement constitutes a confession of guilt to the crime charged."[493] A "confession" includes any inculpatory statement constituting an admission short of a full acknowledgment of guilt,[494] and several cases have found error from admission of psychiatric testimony that referred to statements that might be construed as admissions.[495]

---

[487] *See* Seng v. Commonwealth, 445 Mass. 536 (2005) (applying this principle to competency evaluations).

[488] Mass. R. Crim. P. 14(b)(2)(B)(iii). Another provision, Rule 14(h)(2)(B)(ii), similarly prohibits delivery to the prosecutor of any evidence obtained from the defendant during the examination, except for purely physical or physiological test results, unless the court orders its release pursuant to the above conditions.

[489] Reporter's Notes to Mass. R. Crim. P. 1414(b)(2)(B)(iii). *See also* Commonwealth v. Sliech-Broduer, 457 Mass. 300, 321 (2010) (stating that nothing in the rule obligates a defendant, before trial and before the Commonwealth's report is delivered, to provide Commonwealth's expert with copies of her own expert witness's notes and other material).

[490] Reporter's Notes to Mass. R. Crim. P. 1414(b)(2)(B)(iii).

[491] Mass. R. Crim. P. 14(b)(2)(B)(iii).

[492] Seng v. Commonwealth, 445 Mass. 536, 547 (2005).

[493] G.L. c. 233, § 23B. This statute applies to exclude admissions even if the defendant offers his own testimony or experts who rely on his statements, unless the defendant places the particular admissions in evidence himself. Commonwealth v. Callahan, 386 Mass. 784, 789 (1982); Blaisdell v. Commonwealth, 372 Mass. 753, 769 (1977).

[494] Commonwealth v. Martin, 393 Mass. 781, 787 (1985) (defendant's statement that he knew he would get arrested is inculpatory under the statute); Commonwealth v. Callahan, 386 Mass. 784, 788 (1982) (citing Blaisdell v. Commonwealth, 372 Mass. 753, 763 (1977)).

[495] Commonwealth v. Callahan, 386 Mass. 784 (1982) (statement by defendant that he shot the victim with thought beforehand was inadmissible despite defense reliance on experts); Commonwealth v. Martin, 17

5. *Additional discovery:* Rule 14(b)(2)(C) provides that, on a showing of necessity, the court may order other discovery to the prosecution and defense regarding the defendant's mental condition. However, given the carefully drawn provisions of (b)(2) and the risk that exceeding them may violate the privilege against self-incrimination, a court should be very cautious in its handling of this provision. The Reporter's Notes to (b)(2)(C) state that it is "a very limited grant of discretion and should be reserved for cases presenting discovery issues that are out of the ordinary. In this respect, it is more restrictive than the analogous discovery provision in Rule 14(a)(2)."

### 3. Sanctions for Noncompliance

Rule 14(b)(2) severely limits the remedies and sanctions that may be ordered in response to noncompliance with its provisions. *First*, an insanity defense may be raised at any time before or during trial, notwithstanding the defendant's failure to give the required pretrial notice or the defendant's refusal to submit to a court ordered psychiatric examination.[496] But if the defendant refuses to submit to an examination, the court may preclude only *expert* testimony[497] or admit evidence of the defendant's refusal.[498] Language in the rule that the judge may also prescribe "such remedies as he deems warranted by the circumstances"[499] seems severely constrained by the above conditions.

If the Commonwealth orders a psychiatric examination of the defendant prior to the defendant's notice of a defense of lack of criminal responsibility, there is no error if it does not result in improper or unfair argument by the prosecutor.[500]

## 16.7C. NOTICE OF DEFENSE OF LICENSE, AUTHORITY, OR EXEMPTION

The defendant must give written notice to the Commonwealth, and file a copy with the clerk, of her intent to defend on the basis of license, claim of authority or ownership, or exemption. The Reporter's Notes succinctly define these terms:

A "license" is defined as a right granted by the Commonwealth or other competent authority to do a particular act or carry on a particular business which, without such license, would be unlawful. A "claim of authority" is an assertion that the claimant has received an express or implied right to do an act from one lawfully empowered to grant such right. A "claim of ownership" is an assertion that the

---

Mass. App. 717, 724 (1984), *aff'd,* 393 Mass. 781 (1985) (defendant's statements to experts about events leading up to crime did not open door to use of admissions to court-appointed psychiatrist about state of mind during shooting); Commonwealth v. O'Connor, 7 Mass. App. Ct. 314, 316–19 (1979) (error to admit inculpatory statements despite waiver of privilege via expert testimony, but harmless because defendant introduced similar statements).

[496] Chin Kee v. Commonwealth, 354 Mass. 156, 158 (1968); Commonwealth v. Guadalupe, 401 Mass. 372, 374–75 (1987) (insanity may be raised even after prosecution has rested).

[497] Mass. R. Crim. P. 14(b)(2)(B)(iv); Commonwealth v. Guadalupe, 401 Mass. 372, 375–76 (1987) (reversal because lay person's testimony on insanity issue was wrongly excluded since preclusion only applies to expert testimony). *But see* Commonwealth v. Dotson, 402 Mass. 185 (1988) (expert testimony wrongly excluded because although defendant did not give notice of expert pretrial, he did not refuse to submit to a psychiatric examination).

[498] Mass. R. Crim. P. 14(b)(2)(B)(iv). *But see* Commonwealth v. Hunter, 416 Mass. 831, 835–36 (1994) (defendant ordered by court to submit to one examination had right to refuse further examination, so it was error to admit evidence of his refusal).

[499] Mass. R. Crim. P. 14(b)(2)(B)(iv).

[500] Commonwealth v. Brown, 75 Mass. App. Ct. 361 (2009).

claimant has a right of possession enforceable in a court. An "exemption" is a release from a duty or obligation to which others are subject.[501]

The notice must be submitted within the time provided by Rule 13(d)(2) for the filing of pretrial motions. Rule 14(b)(3) provides that noncompliance results in exclusion of the defense,[502] although the judge is also authorized "for cause shown" to allow late filing, order a continuance for preparation, or make other appropriate orders.[503]

### 16.7D. ALIBI

The "notice of alibi" provision is triggered by a motion of the Commonwealth stating the time, date, and place at which the alleged offense was committed. The court may then order the defendant to serve a written notice on the prosecutor, signed by the defendant personally, containing his intention to offer an alibi defense, the place at which the defendant claims to have been at the time of the offense, and the names and addresses of witnesses on whom he intends to rely to establish the alibi,[504] or partial alibi.[505] A potential alibi witness should be disclosed when there is a reasonable possibility that the testimony may be used, not when the decision to use the alibi witness's testimony is firm.[506]

Once defense counsel has notified the Commonwealth of the alibi witness, the Commonwealth has seven days to serve upon the defendant written notice of the names and addresses of witnesses on whom the Commonwealth intends to rely to (a) establish the defendant's presence at the crime or (b) rebut the testimony of any of the defendant's alibi witnesses.[507]

"For cause shown" the judge may grant an exception to any of the above requirements.[508]

*Consequences of non-disclosure:* Rule 14(b)(1)(D) provides as a possible sanction for either party's non-disclosure the exclusion of the undisclosed prosecution or defense testimony, but the defendant's personal testimony cannot be excluded.[509] (Non-disclosure of an alibi witness after court order may also constitute ineffective assistance of counsel.[510]) The Reporter's Notes imply preclusion should be a last resort, and in some circumstances may abridge the defendant's constitutional rights:

---

[501] Reporter's Notes to Mass. R. Crim. P. 14(b)(3). For further discussion of these terms, *see* G.L. c. 378, § 7 (presumption of nonauthorization); Commonwealth v. Munoz, 384 Mass. 503 (1981); Commonwealth v. Jefferson, 377 Mass. 716 (1979); Commonwealth v. Jones, 372 Mass. 403 (1977).

[502] *See, e.g.,* Commonwealth v. Parzick, 64 Mass. App. Ct. 846, 853 (2005) (defendant waived right to present defense of license because failed to give notice); Commonwealth v. O'Connell, 438 Mass. 658, 665 (2003)(waiver of claim of authority).

[503] Mass. R. Crim. P. 14(b)(3).

[504] Mass. R. Crim. P. 14(b)(1)(A).

[505] When an indictment charges divers dates but the thrust of an alibi witness's testimony is to place the defendant away from the scene of the offense on some of the dates, non-disclosure may still result in exclusion. Commonwealth v. Freitas, 59 Mass. App. Ct. 903, 904 (2003).

[506] Commonwealth v. Mac Hudson, 446 Mass. 709, 725 n. 14 (2006).

[507] Mass. R. Crim. P. 14(b)(1)(B). *See also* Commonwealth v. Delaney, 11 Mass. App. Ct. 398 (1981).

[508] Mass. R. Crim. P. 14(b)(1)(E). *Compare* Commonwealth v. Delaney, 11 Mass. App. Ct. 398 (1981) (despite defendant's constitutional right, the prosecutor's failure to provide name of alibi rebuttal witness in advance of trial was harmless) *with* United States v. Myers, 550 F.2d 1036 (5th Cir. 1977), *appeal after remand,* 572 F.2d 506 (5th Cir. 1978) (interpreting prosecutorial reciprocal obligation strictly).

[509] Mass. R. Crim. P. 14(b)(1)(D). *See also infra* § 16.8E (limitations on preclusion sanction against defense; Commonwealth v. Giontzis, 47 Mass. App. Ct. 450 (1999), quoting Commonwealth v. Delaney, 11 Mass. App. Ct. 398, 403 (1981)(exclusion appropriate remedy for intentional non-disclosure of alibi rebuttal witness); Commonwealth v. Cutty, 47 Mass. App. Ct. 671, 673 (1999)(reversible error to deny defense counsel ability to argue alibi).

[510] Commonwealth v. Mac Hudson, 446 Mass. 709, 725 (2006).

> [I]f, in the court's discretion, no other order is appropriate to serve the purposes of this rule, it may exclude the testimony of any undisclosed witness offered by either party as to the defendant's absence from, or presence at, the scene of the alleged offense...If a defendant against whom a sanction is imposed is convicted, he or she may, of course, preserve for argument on appeal the issue of whether imposition of that sanction amounted to an abuse of discretion or the denial of any constitutional right.[511]

*Withdrawal of alibi:* The defendant's notice of alibi may be withdrawn and statements within it are not admissible against him in any civil or criminal proceeding.[512]

## 16.7E. SELF-DEFENSE CLAIM THAT VICTIM WAS FIRST AGGRESSOR

A 2012 amendment to Rule 14, effective Sept. 17, 2012, added a new special procedure concerning certain self-defense claims. Rule 14(b)(4) requires the defendant to give notice and certain information to the prosecution if she intends "to introduce evidence of the alleged victim's specific acts of violence to support an allegation that he or she was the first aggressor."[513] The notice must include a brief description of each such act, its location and date "to the extent practicable," and the names, addresses and dates of birth of the witnesses who will testify to this information. The Reporter's Notes stress the limited scope of this provision; it does not apply to all evidence of prior violent conduct by the victim, but only such prior conduct which is to be offered as probative on the identity of the first aggressor.[514] Subdivision 14 (b)(4) codifies a discovery obligation established earlier by case law.[515]

After receipt of this notice, the Commonwealth is obligated to serve on the defendant written notice briefly describing any intended rebuttal evidence, the names of the witnesses the Commonwealth intends to call, the addresses and birthdates of non-law-enforcement witnesses and the business address of any law enforcement witnesses.[516]

*Non-disclosure* by either side may result in the exclusion of the party's evidence on the issue of the identity of the first aggressor.[517]

*Timing:* The defendant's notice must be served on the prosecutor, with a copy filed with the clerk, no later than 21 days after the pretrial hearing.[518] Within 30 days after service, the prosecutor must serve upon the defendant its responsive notice.[519] Both of the deadlines may be extended by the judge for good cause.

---

[511] Reporter's Notes to Rule 14(b)(1), citing *Commonwealth v Edgerly*, 372 Mass. 337, 339, 343 (1977); Commonwealth v. Reynolds, 429 Mass. 388, 398-399 (1999); Commonwealth v. Durning, 406 Mass. 485, 496 (1990); Commonwealth v. Chappee, 397 Mass. 508, 518 (1986); and Taylor v. Illinois, 484 U.S. 400 (1988).

[512] Mass. R. Crim. P. 14(b)(1)(F).

[513] Mass. R. Crim. P. 14(b)(4)(A).

[514] Reporter's Notes to Mass. R. Crim. P. 14(b)(4).

[515] *See* Commonwealth v. Adjutant, 443 Mass. 649 (2005); Commonwealth v. Fontes, 396 Mass. 733, 735-36 (1986).

[516] Mass. R. Crim. P. 14(b)(4)(B).

[517] Mass. R. Crim. P. 14(b)(4)(D)

[518] Mass. R. Crim. P. 14(b)(4)(A).

[519] Mass. R. Crim. P. 14(b)(4)(B).

# §16.8 LIMITATIONS ON PROSECUTORIAL DISCOVERY [520]

## 16.8A. INTENDED EVIDENCE

Under Rule 14, the defendant need only produce evidence that he intends to use at trial.[521] For example, there is no obligation under Rule 14 to turn over the identities of experts who gave unfavorable opinions and therefore are not intended for trial use.[522] The U.S. Supreme Court has made clear that limiting prosecutorial discovery to intended evidence is required under the Fifth Amendment[523] and it is also required under the broader privilege against self-incrimination contained in the Massachusetts Constitution Declaration of Rights.[524]

As to witness' statements, Rule 14(a)(1)(B) limits *automatic* prosecutorial discovery to the statements of witnesses the defense *intends to call*. But the SJC has held that either party may file a motion to discover statements of witnesses the opposing party does not plan to call, so long as it does intend to use the statement in cross-examination, and that granting such a motion does not run afoul of constitutional limits.[525]

In any case, the restriction of prosecutorial discovery to evidence the party *intends to use* is a major limitation. It should protect the defense from being required to divulge either unfavorable evidence or potential evidence that might be used depending on contingencies at trial. This is no technical matter; any attorney knows that much evidence is a double-edged sword that should not be used unless trial circumstances demand. For example, no attorney would present a self-defense witness if the Commonwealth's identification case proved unpersuasive at trial. As the Supreme Judicial Court has noted in another context,

---

[520] Such limitations are addressed in more detail in Blumenson, *Constitutional Limitations on Prosecutorial Discovery,* 18 Harv. C.R.C.L. L. Rev. 123 (1983).

[521] Mass. R. Crim. P. 14(a)(1)(B) (reciprocal discovery); 14(b)(1)(A) (alibi discovery); 14(b)(2)(A) (insanity defense discovery); 14(b)(3) (discovery of intention to defend by license, claim of authority or ownership, or exemption); 14(b)(4)(discovery of intention to assert self-defense/first aggressor defense with prior violent acts of alleged victim).

[522] Commonwealth v. Haggerty, 400 Mass. 437, 440–41 (1987).

[523] Williams v. Florida, 399 U.S. 78 (1970). *See also* Commonwealth v Durham, 446 Mass. 212, 226-28 (2006). *Williams* held that the defendant would be waiving his privilege against self-incrimination at trial by putting on the evidence, and accelerating the disclosure of this evidence to the pretrial phase does not violate the privilege. The reasoning and constraints found in *Williams* are discussed in more detail *infra* at the last footnote of this section.

[524] Art. 12 reads, "No subject shall be compelled to accuse, or furnish evidence against himself" The S.J.C. has indicated that it would be prepared to find broader protection than might be available under the fifth amendment because of the "rather clearer terms" of the state constitutional privilege. Commonwealth v. Hughes, 380 Mass. 583 (1980). Commonwealth v Durham, 446 Mass. 212, 226 (2006), notes both the Fifth Amendment constitutional limitation to intended defense evidence, and the stronger protection afforded by Art. 12. *But see* Commonwealth v. Trapp, 423 Mass. 356, 363 (1996) (ordering prosecution discovery of defense expert reports that defense counsel did not intend to use at trial and had not shown to any testifying expert witness, was, if error, "nonconstitutional," and remedy hinges on possible prejudice).

[525] Commonwealth v Durham, 446 Mass. 212 (2006). In dissent, Cordy, J., found the ruling eviscerated the balance of forces between the parties (an issue that might yet be litigated in the U.S. Supreme Court):

> Having obtained the statements, the Commonwealth can now inform the witness of their discovery, thereby permitting the witness in advance to think of and craft a response to the cross-examination. The discovery thus provides a hitherto unavailable opportunity to reshape what the jury would otherwise see in unvarnished form. The "greatest legal engine" in the search for truth is reduced to a mere sputter.

*Id*. at 236. Regarding the balance of forces, see *infra* sec. 16.8D.

> Defense counsel may not know what evidence, if any, he will present until he has heard and evaluated the government's case. . . . It may, therefore, be prudent to reserve opening until after the government has rested, but the freedom to make the choice, under our rule, is that of defense counsel alone.[526]

Recognizing this point, the Supreme Court has struck down a law that required the defendant to choose whether to present his own testimony before hearing how other defense witnesses actually testified at trial, because it deprived him of information needed for an informed decision about whether his testimony would be helpful.[527]

This is an important point because it appears that "intended evidence" is often interpreted in daily practice to mean all potential evidence the defendant *might* use.[528] That interpretation is tantamount to a "pretrial disclosure or abandonment" rule in which the defendant must preserve the possible use of any evidence at trial by disclosing all potential evidence before trial. But requiring the defendant to decide "now or never" whether to use evidence presents that type of compulsion used by high-pressure salespeople who use "last chance" sales techniques on their customers. Such an increased burden on the Fifth Amendment right to silence violates the reasoning and limits of the Supreme Court's endorsement of prosecutorial discovery and unconstitutionally compels incrimination,[529] as well as violating the clear language of Rule 14.

### 16.8B. EVIDENCE THAT ASSISTS IN PROVING THE GOVERNMENT'S CASE IN CHIEF

A constitutional problem may arise when a prosecutorial discovery order would reach defense evidence that would assist the government in proving its case in chief. Unlike the notice-of-alibi statute

---

[526] Commonwealth v. Dupree, 16 Mass. App. Ct. 600, 603 (1983).

[527] *See* Brooks v. Tennessee, 406 U.S. 605 (1972). In *Brooks,* the Supreme Court struck down a Tennessee rule that compelled a defendant to testify first in the defense case or not at all, finding it abridged the privilege against self-incrimination. Because the defendant cannot know in advance whether his witnesses will testify as expected or be effective on the stand, he may not know whether his own testimony would be helpful, and therefore must retain the right to remain silent until his own testimony's value can be realistically assessed. Thus the rule precludes the defendant from deciding whether to testify "in the unfettered exercise of his own will": "[The rule] exacts a price for his silence by keeping him off the stand entirely unless he chooses to testify first. This . . . casts a heavy burden on the defendant's otherwise unconditional right not to take the stand. The rule, in other words, "cuts down on the privilege by making its assertion costly." *Brooks v. Tennessee, supra,* 406 U.S. at 610–11.

[528] *See, e.g.,* Gilday v. Commonwealth, 360 Mass. 170, 172 (1971) (dicta stating that probably the only effective way to enforce a discovery order where defendant disclaims pretrial intention to assert a defense is to exclude it).

[529] In Williams v. Florida, 399 U.S. 78 (1970), the Supreme Court upheld a limited form of prosecutorial discovery against Fifth Amendment challenge on the theory that, however incriminating the disclosures, they were not compelled. The Court reasoned that the defendant was not compelled to incriminate himself because he retained the choice whether to be silent or present evidence. The notice-of-alibi rule at issue in that case only ordered discovery of evidence the defendant intended to introduce at trial, thereby simply accelerating the timing of a voluntary disclosure of "information that the petitioner from the beginning planned to divulge at trial" (*Williams v. Florida, supra*, 399 U.S. at 84) but not compelling the disclosure itself.

However, it is clear from the reasoning of *Williams* and of Brooks v. Tennessee, 406 U.S. 605 (1972), discussed *supra*, that prosecutorial discovery can only reach material the defendant has decided to use at trial, not material he potentially might use depending on the state of the evidence. Were a discovery order to reach such evidence, it would affect not merely the timing of the waiver but also the decision whether to waive the privilege. This creates more compulsion than is inherent in the trial process because the defendant is forced to consider a more powerful hypothetical state's case than he may actually face at trial. The number of defense disclosures will be far greater if it is necessary to defend against many contingencies rather than one actuality.

examined by the Supreme Court,[530] disclosure of other defense evidence may provide very real assistance to the Commonwealth in meeting its burden. For example, a self-defense witness will provide proof of the element of identity, and a "last resort" witness with evidence proving the defendant guilty only of a lesser included offense will supply probative evidence of some of the elements of the crime. Likewise, evidence of mistake, duress, or insanity may assist the Commonwealth in meeting its burden of proof.

In these situations, disclosure before the prosecution has put forward a *prima facie* case would destroy a defense based on the government's failure to prove an element of the crime.[531] Such a forced choice between the Sixth Amendment right to present a defense and the Fourteenth Amendment right to defend by failure of government proof, never required prior to Rule 14, would raise grave problems by unnecessarily rendering constitutionally protected rights mutually exclusive.[532] Additionally, such discovery would violate the presumption of innocence, which constitutionally mandates the order of proof at a criminal trial. The presumption of innocence assures the accused the right to "remain inactive and secure, until the prosecutor has taken up its burden and produced evidence";[533] only after a prima facie government case does "the necessity of adducing evidence . . . [devolve] on the accused."[534] Changing this balance risks exploratory prosecutions in which the Commonwealth brings charges without sufficient evidence to convict in the hope that prosecutorial discovery will make up the deficit.[535]

Where prosecutorial discovery would reach information that helps to prove an element of the crime, counsel should consider opposing the motion, or seeking a protective order, as to that evidence.

### 16.8C. PRIVILEGES

Prosecutorial discovery cannot reach privileged materials. Of particular note here are items protected by the Fifth Amendment privilege against self-incrimination (*see supra* § 16.8A), the attorney-client privilege, and the attorney's work product. Although Massachusetts has adopted a

[530] Williams v. Florida, 399 U.S. 78 (1970).

[531] In re Winship, 397 U.S. 358, 364 (1970). The due process clause guarantees that "no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the fact-finder of his guilt." Speiser v. Randall, 357 U.S. 513, 526 (1958).

[532] *Cf.* Simmons v. United States, 390 U.S. 377, 392–94 (1968) ("in these circumstances, we find it intolerable that one constitutional right (the Fifth Amendment privilege] should have to be surrendered in order to assert another [Fourth Amendment rights]").

[533] Bell v. Wolfish, 441 U.S. 520, 533 (1979). According to *Bell,* the presumption of innocence governs the burden of production at trial by mandating the order of proof. The presumption of innocence shares the same constitutional protection as explicit guarantees (Richmond Newspapers Inc. v. Virginia, 448 U.S. 555, 580 (1980)), is secured by the Fourteenth Amendment (Estelle v. Williams, 425 U.S. 501, 503 (1976)), and is a fundamental right of the defendant. Taylor v. Kentucky, 436 U.S. 478, 483 (1978).

[534] Agnew v. United States, 165 U.S. 36, 49–50 (1897).

[535] The Fifth Amendment privilege also protects against disclosure of evidence that is necessary for the state to present a prima facie case. Under Williams v. Florida, 399 U.S. 78 (1970), compelled production of defense evidence is permitted only to the degree that the defendant would introduce it at trial, based on a theory that pretrial discovery of such evidence only advances the timing of the Fifth Amendment waiver but does not compel any waiver the defendant would not make voluntarily at trial anyway. (See discussion *supra* at § 16.8A.) But when the state is unable to present a prima facie case, the defendant will not produce any evidence at trial at all, because he will obtain a required finding of not guilty at the close of the state's case.

Discovery of such defense material must be barred if the Fifth Amendment is to continue to guarantee that "the government seeking to punish an individual produce the evidence against him by its own independent labors" (Miranda v. Arizona, 384 U.S. 436 (1966)), and "may not by coercion prove a charge against an accused out of his own mouth." Malloy v. Hogan, 378 U.S. 1, 7–8 (1964).

restricted definition of "work product," it should shield the vast bulk of attorney files, as discussed *supra* at § 16.3D.

### 16.8D. RECIPROCITY

Rule 14, as revised in 2004, makes prosecutorial discovery of certain items automatic. But under Supreme Court precedent, it violates due process to afford the prosecution categories of discovery which have not been afforded to the defense, because that alters the constitutional-mandate balance of forces between the parties.[536] Therefore Rule 14 provides for defense discovery to take place first, with the defendant's obligation to provide reciprocal discovery commencing only after the Commonwealth has fulfilled its obligation (which is certified via a Certificate of Compliance).[537] If it turns out that there has been improper, nonreciprocal prosecutorial discovery, the Commonwealth's nondisclosed evidence must be excluded; if it is not, on appeal the Commonwealth will have the burden of demonstrating that the error was harmless beyond a reasonable doubt.[538]

### 16.8E. SANCTIONS AGAINST THE DEFENSE

Rule 14 provides a choice of sanctions for noncompliance with discovery orders, as discussed generally *supra* at sec. 16.4. Under Rule 14(c)(1), the judge may "grant a continuance or enter such other order as it deems just under the circumstances." Subdivision (c)(2) authorizes the court to exclude evidence for non-compliance, but it specifically forbids application of the exclusionary sanction to the testimony of the defendant,[539] or to mental health defenses except insofar as authorized by Rule 14(b)(2)(B)(iv).[540] With regard to a defendant's failure to provide notice of alibi, Rule 14(b)(1)(D) prohibits the court from precluding the defendant's own alibi testimony.[541]

The right to present a defense, guaranteed by the state and federal constitutions' compulsory process clauses and by a Massachusetts statute,[542] establishes an additional limit on use of the preclusion sanction. As the Supreme Judicial Court has noted, when defense testimony is excluded for nondisclosure, "a significant constitutional question will be whether, in the circumstances of that case, the defendant was barred unconstitutionally from presenting a defense as the Constitutions of the Commonwealth (Art. 12 of the Declaration of Rights) and the United States (Sixth Amendment) permit."[543] The Massachusetts courts, First Circuit, and U.S. Supreme Court have since upheld the

[536] Wardius v. Oregon, 412 U.S. 470 (1973). *See also* Commonwealth v Durham, 446 Mass. 212, 229 (2006)(citing Wardius); Commonwealth v. Edgerly, 372 Mass. 337 (1977); Gilday v. Commonwealth, 360 Mass. 170, 172 (1971).

[537] Mass. R. Crim. P. 14(b).

[538] Commonwealth v. Hanger, 377 Mass. 503, 510–12 (1979).

[539] Mass. R. Crim. P. 14(c).

[540] Regarding sanctions for nondisclosure of insanity defense, *see supra* sec. 16.7B(3).

[541] Under this subsection, failure to provide notice of alibi "shall not limit the right of the defendant to testify on his own behalf." In Commonwealth v. Cutty, 47 Mass. App. Ct. 671, 673 (1999), the court reversed a conviction, holding that a defendant who fails to provide notice of alibi retains the right (1) to testify concerning his whereabouts, (2) to argue an alibi defense based on this testimony, and (3) to have an alibi jury instruction.

[542] G.L. c. 263, § 5 (guaranteeing a defendant the right "to produce witnesses and proofs in his favor").

[543] Commonwealth v. Edgerly, 372 Mass. 337, 339, 343 (1977). For example, in another context, the Supreme Court held that a state statute making accomplices or accessories categorically incompetent to testify violated the defendant's Sixth Amendment right to compulsory process "because [it] arbitrarily denied [the defendant] the right to put on the stand a witness who was physically and mentally capable of testifying to events

exclusion of defense evidence as a sanction in limited circumstances, while noting that the constitution forbids wholesale use of preclusion.[544]

In determining what violations are sufficiently serious to constitutionally permit exclusion, the Supreme Judicial Court has required the trial courts to apply a balancing test, weighing the Commonwealth's interest in enforcing procedural rules against the defendant's constitutional right to present evidence. It has specified the following relevant factors: "(1) prevention of surprise; (2) evidence of bad faith in the violation of the conference report; (3) prejudice to the other party caused by the testimony; (4) the effectiveness of less severe sanctions; and (5) the materiality of the statements to the outcome of the case."[545] Failure to consider all these factors before preclusion of defense evidence has been held grounds for reversal.[546] The Supreme Court enunciated a similar balancing test.[547]

---

that he personally observed, and whose testimony would have been relevant and material to his defense." Washington v. Texas. 388 U.S. 14 (1967).

*See also* Reporter's Notes to 14(b)((1), the Notice of Alibi provision, which state that if "a defendant against whom a sanction is imposed is convicted, he or she may, of course, preserve for argument on appeal the issue of whether imposition of that sanction amounted to an abuse of discretion or the denial of any constitutional right," citing *Edgerly, supra* at 339 and 343; Commonwealth v. Reynolds, 429 Mass. 388, 398-399 (1999); Commonwealth v. Durning, 406 Mass. 485, 496 (1990); Commonwealth v. Chappee, 397 Mass. 508, 518 (1986); and Taylor v. Illinois, 484 U.S. 400 (1988).

[544] Michigan v. Lucas, 500 U.S. 145 (1991) (reversing lower court's per se bar on preclusion sanction where defendant did not give notice of intended evidence as required under rape-shield law); Taylor v. Illinois, 484 U.S. 400 (1988) (upholding exclusion of defense eyewitness not previously disclosed); United States v. Nobles, 422 U.S. 225 (1975) (upholding exclusion of defense investigator's testimony regarding prosecution witness's statements to him because defense would not produce the statements); Commonwealth v Durham, 446 Mass. 212 (2006); Commonwealth v. Durning, 406 Mass. 485, 496 (1990); Commonwealth v. Chappee, 397 Mass. 508, 517 (1986)(upholding exclusion of defendant's chemist's testimony regarding cocaine testing techniques, for violation of pretrial discovery agreement); Commonwealth v. LaFrennie, 13 Mass. App. Ct. 977, 978–79 (1982) (rescript) (upholding exclusion of undisclosed alibi witness where no offer of proof); Commonwealth v. Porcher, 26 Mass. App. Ct. 517 (1988) (undisclosed defense alibi witness properly excluded where no offer of proof, no explanation for violation, and two continuances already); Commonwealth v. Mellone, 24 Mass. App. Ct. 275, 283 (1987] (judge would have been justified in excluding psychiatric opinion since defense did not provide witness names and statements until day before trial). *Compare* United States v. Davis, 639 F.2d 239, 243 (5th Cir. 1981) ("compulsory process clause . . . forbids exclusion of otherwise admissible evidence solely as a sanction to enforce discovery rules or orders against criminal defendants").

[545] Commonwealth v. Reynolds, 429 Mass. 388, 399 (1999), citing Commonwealth v. Durning, 406 Mass. 485, 496 (1990) and Commonwealth v. Chappee, 397 Mass. 508, 518 (1986). *Accord* Commonwealth v. Steinmeyer, 43 Mass. App. Ct. 185 (1997) (preclusion of critical defense witness as sanction for defense counsel's failure to comply with reciprocal discovery by turning over witness statement was abuse of discretion; lesser sanctions would have sufficed).

In *Reynolds,* the SJC noted that preclusion of defense evidence should be reserved for cases in which "the Commonwealth is prejudiced significantly by surprise and there is no reasonable, alternative means of achieving the purpose of the rule." To preclude defense evidence, the trial judge must make explicit findings that the "Durning factors" "have been considered in balancing enforcement of the rules against the defendant's right to present a defense." *Id.* at 398.

[546] Commonwealth v. Dranka, 46 Mass. App. Ct. 38, 41 (1998); Commonwealth v. Steinmeyer, 43 Mass. App. Ct. 185, 190 (1997).

[547] The court must weigh the constitutional right to present a defense against countervailing public interests, including the integrity of the adversary process, the interest in the fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process. The court should also consider the explanation, willfulness of the violation, relative simplicity of compliance, and whether an unfair tactical advantage was sought. Taylor v. Illinois, 484 U.S. 400 (1988). *Accord* Chappee v. Vose, 843 F.2d 25, 29 (1st Cir. 1988). The Supreme Court did not consider it significant that the attorney might have violated the requirements without the defendant's knowledge, approval, or complicity; unless counsel was ineffective under

Beyond this, the courts have emphasized caution, since "exclusionary sanctions must appropriately be reserved for hard-core transgressions."[548] The First Circuit approved exclusion of expert chemists in a drug case because it was uncontested that the nondisclosure was in bad faith: the violation was "lurid, unequivocal and deliberate," a "deliberate and calculated ploy, prejudicial to the government's litigation stance and menacing to the very integrity of the adversary process."[549]

Defense counsel faced with the prospect of such a sanction should emphasize several points. *First,* if the constitutional and statutory limits on prosecutorial discovery addressed *supra* have been violated, that point should be argued and preserved. For example, if the prosecutor did not provide reciprocal discovery, under the due process clause the defendant cannot be required to provide discovery.[550] Or the issue may involve defense counsel's good faith — whether she was aware of the evidence before the day she sought to offer it, or if so, whether she knew she would use it before events and trial indicated the wisdom of doing so. The privilege against self-incrimination prohibits prosecutorial discovery of such contingent evidence,[551] and the compulsory process clause may prohibit application of the preclusion sanction to good-faith nondisclosure as well.[552] *Second,* even if the attorney did violate the requirements in bad faith, it is at least inequitable if not unconstitutional for the defendant to lose the right to present evidence not through a knowing waiver but by virtue of his lawyer's misconduct.[553] *Third,* preclusion can be a draconian sanction that negates the truth-finding

---

the Sixth Amendment, the court found the client bound by the attorney's decision not to disclose. *Taylor v. Illinois*, *supra,* 484 U.S. at 417-418.

[548] Commonwealth v. Dranka, 46 Mass. App. Ct. 38, 42 (1998), citing Chappee v. Vose, 843 F.2d 25, 31 (1st Cir. 1988). The Chappee case cites the Reporter's Notes to Rule 14(c), which state that Massachusetts reserves the sanction for extreme cases that are deliberate and prejudicial, and the Supreme Court's approval in Taylor v. Illinois, 484 U.S. 400, 417 n.23 (1988), of a procedure reserving preclusion for the exceptional instance of deliberate contumacious or unwarranted disregard of the court's authority. *See also* Commonwealth v. Edgerly, 372 Mass. 337, 343 (1977)(preclusion sanction is extreme and should be imposed only where the Commonwealth is prejudiced significantly by surprise and there is no reasonable, alternative means of achieving the purpose of the rule).

[549] Chappee v. Vose, 843 F.2d 25, 30 & n.3, 32 (1st Cir. 1988).

[550] Wardius v. Oregon, 412 U.S. 470 (1973). *Compare* Commonwealth v. Delaney, 11 Mass. App. Ct. 398 (1981) (despite defendant's constitutional right, the prosecutor's failure to provide name of alibi rebuttal witness in advance of trial was harmless) *with* United States v. Myers, 550 F.2d. 1036 (5th Cir. 1977), *appeal after remand,* 572 F.2d 506 (5th Cir. 1978) (interpreting prosecutorial reciprocal obligation strictly).

[551] As noted above, bad faith is a constitutional requirement since under the Fifth Amendment, the defendant can be required to disclose only that evidence that he intends to introduce, not potential evidence that might be offered depending on trial contingencies. *Compare* Chappee v. Vose, 843 F.2d 25, 28, 30 (1st Cir. 1988) (right to present a defense may be limited where defendant 'has figuratively thumbed his nose at applicable requirements of pretrial discovery," and here violation was admittedly deliberate) *with* Commonwealth v. Donovan, 395 Mass. 20, 23–24 (1985) (evidence admitted because prosecutor unaware of it previously, citing Commonwealth v. Costello, 392 Mass. 393, 400 (1984)); Commonwealth v. Scalley, 17 Mass. App. Ct. 224, 231 (1983) (same); *and* Commonwealth v. Cannavo, 16 Mass. App. Ct. 977 (1983) (same).

[552] *See* Taylor v. Illinois, 484 U.S. 400, 417 n.23 (1988) (confrontation clause permits exclusion if omission was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence").

[553] See, e.g., Commonwealth v. Sena, 429 Mass. 590, 594-5 (1999), the SJC reversed a conviction where defense evidence, not disclosed pursuant to a reciprocal discovery order, was precluded. The SJC saw this as "ineffective assistance of counsel" for which defendant should not have been penalized. In Taylor v. Illinois, 484 U.S. 400 (1988), however, the Supreme Court majority did not consider it significant that the attorney might have violated the requirements without the defendant's knowledge, approval, or complicity; unless counsel was ineffective under the sixth amendment, the court found the client bound by the attorney's decision not to disclose. The dissenters found preclusion unjustified when the defendant was personally blameless and argued that the unjust, arbitrary, and distorting effects of preclusion could be avoided, and greater deterrent value achieved, by

function of the trial by permitting a conviction in a nonadversary proceeding by a jury unaware of the defense. In this connection, the Supreme Judicial Court has stated that a court is more justified in excluding impeachment evidence than substantive, affirmative evidence.[554] *Fourth,* the Supreme Judicial Court criterion requires that the court consider whether a lesser sanction would be adequate, in which case the lesser sanction should be used.[555] Such sanctions might include a continuance for investigation, recalling a witness, the contempt power, comment to the jury on the nondisclosure, and sanctions against the defense attorney rather than the defendant. *Finally,* on numerous occasions the courts have found an admitted *Commonwealth* discovery violation to be nonprejudicial, or sufficiently cured by a continuance for investigation.[556] These cases should set a precedential limit on use of the

---

use of sanctions against the lawyer personally, such as a fine, contempt, or lodging of a disciplinary complaint. *Taylor v. Illinois, supra,* 484 U.S. at 419 (Brennan, J., dissenting). *See* Commonwealth v. Steinmeyer, 43 Mass. App. Ct. 185 (1997) (instead of precluding critical defense testimony, judge could have served any interest in vindication of rules by imposing fine or costs of delay on defense counsel); Escalera v. Coombe, 826 F.2d 185, 191–92 (2d Cir. 1987) (in absence of complicity, attorney's bad faith violation of criminal procedure rules cannot be imputed to defendant, citing Commonwealth v. Chappee, 397 Mass. 508 (1986)).

[554] Commonwealth v. Chappee, 397 Mass. 508, 518 (1986) (exclusion more appropriate because defense experts would have challenged prosecution experts, not put in their own opinion of substance composition); Commonwealth v. Gilbert, 377 Mass. 887 (1979) (" (a) claim of prejudice is perhaps more easily sustained where the new material comes in, not on direct examination where it can be met with cross examination, but by way of impeachment").

[555] In Commonwealth v. Reynolds, supra at 399-400, the SJC stated that "[a]lternative sanctions are adequate and appropriate in most cases….Before prohibiting the use of undisclosed material during the cross-examination of a witness or prohibiting a witness from testifying, the judge must make explicit his findings regarding the five factors outlined in *Durning,* especially his consideration of alternative sanctions. *See also* Commonwealth v. Sena, 429 Mass. 590, 596 (1999)(reversed because defense witness precluded); Commonwealth v. Reynolds, 429 Mass. 388, 399 (1999); Commonwealth v. Dranka, 46 Mass. App. Ct. 38, 42 (1998); Commonwealth v. Chappee, 397 Mass. 508, 518 (1986)(continuance for investigation was not found to be required as a lesser sanction in the circumstances of that case); Commonwealth v. Edgerly, 372 Mass. 337, 343 (1977) (preclusion of witnesses should be imposed only where significant prejudice and no reasonable, alternative means); Escalera v. Coombe, 826 F.2d 185, 189–93 (2d Cir. 1987) (undisclosed defense alibi witness improperly excluded where surprise was only prejudice to prosecutor and continuance could have remedied it). *Compare* Taylor v. Illinois, 484 U.S. 400, 414 (1988) (exclusion may be imposed without regard to other sanctions if "a pattern of discovery violations is explicable only on the assumption that the violations were designed to conceal a plan to present fabricated testimony").

The defendant should also benefit from case law that holds that a mistrial is not favored as remedy for *prosecutorial* noncompliance with discovery if a continuance for defense investigation or recalling of past witnesses would be sufficient. Commonwealth v. McCann, 20 Mass. App. Ct. 59, 65–66 (1985); Commonwealth v. Delaney, 11 Mass. App. Ct. 398, 403, 405 (1981) (nondisclosure of alibi rebuttal witness, but any prejudice remedied by opportunity to confer with witness, and "general considerations in favor of receiving evidence, likely to be both relevant and probative, could reasonably be taken into account by the judge"). *See also* Commonwealth v. Baldwin, 385 Mass. 165, 176–77 (1982) (unless the delayed evidence is virtually destructive of the defendant's case or strongly supportive of innocence, the defendant should seek additional time for investigation, citing Commonwealth v. Cundriff, 382 Mass. 137, 150 (1980)). Such precedent is especially telling because unlike the Commonwealth, the defendant has a constitutional interest in application of a lesser sanction which does not affect the right to present a defense.

[556] *See, e.g.,* Commonwealth v. Gonzalez, 437 Mass. 276 (2002)(trial court's exclusion of withheld Commonwealth evidence of drug analyses and school zone measurements reversed as inappropriate sanction); Commonwealth v. Garrey, 436 Mass. 422, 439-442 (2002)(non-disclosure of expert opinion was error but not prejudicial); Commonwealth v. Ellerbe, 430 Mass. 769, 779-780 (2000)(surprise disclosure inappropriate, but did not go to heart of defense case); Commonwealth v. Hardy, 431 Mass. 387, 392 (2000)("when measuring prejudice, it is the consequences of the delay in disclosure that are relevant, not the likely impact of the nondisclosed evidence"); Commonwealth v. Emerson, 430 Mass. 378, 380-382 (1999); Commonwealth v.

exclusion sanction because the defendant's interest in presenting evidence is even stronger than the Commonwealth's because it is guaranteed by the Sixth Amendment and article 12. Indeed, the standard is explicitly more stringent since the preclusion sanction against the defense is reserved for the "exceptional circumstances" described earlier in this subsection.

Lopez, 49 Mass. App. Ct. 1116 (2000); Commonwealth v. Giontzis, 47 Mass. App. Ct. 450 (1999)(insufficient prejudice from failure to provide requested discovery of experts history of disqualification); Commonwealth v. Hamilton, 426 Mass. 67, 71 (1997) (no prejudice from late disclosure of inculpatory fingerprint evidence where judge granted two day continuance, restrained prosecutor from mentioning the evidence in opening statement, and stated that additional continuance would be granted during trial if necessary, yet defense announced readiness for trial without seeking further continuances); Commonwealth v. Manning, 44 Mass. App. Ct. 695, 702–05 (1998) (where defense sought early trial date knowing of delayed discovery, and could show no prejudice, trial judge did not abuse discretion by denying motions to exclude testimony and for continuance in violation of pretrial conference order); Commonwealth v. Clements, 36 Mass. App. Ct. 205 (1994) (no right to mistrial for failure to disclose videotape of interview with complaining witnesses; mid-trial continuance sufficient); Commonwealth v. Fossa, 40 Mass. App. Ct. 563, 569 (1996) (in view of trial counsel's failure to request specific relief and no demonstrated prejudice, it was not abuse of discretion to force defendant to trial despite prosecutor's "glaring procedural foul" of delayed disclosure); Commonwealth v. Viriyahiranpaiboon, 412 Mass. 224, 228–29 (1992); Commonwealth v. Spann, 383 Mass. 142, 148–50 (1981) (no prejudice to defense from late disclosure of witness's statement); Commonwealth v. Cundrift 382 Mass. 137, 148–51 (1980) (although disclosure delayed until midtrial, no prejudice either to plea bargaining opportunities or defense at trial); Commonwealth v. Cobb, 379 Mass. 456 (1980) (no prejudice from denial of addresses of prospective witnesses), *judgment vacated in part sub nom.* Massachusetts v. Hurley, 449 U.S. 809 (1980), *appeal dismissed sub nom.* Commonwealth v. Hurley, 382 Mass. 690 (1981), *appeal reinstated,* 391 Mass. 76 (1984); Commonwealth v. Gilbert, 377 Mass. 887 (1979) (prosecutor's failure to inform defendant that previously produced witness statement had been recanted was improper but not prejudicial); Commonwealth v. Gagliardi, 29 Mass. App. Ct. 225, 228–35 (1990); Commonwealth v. Marple, 26 Mass. App. Ct. 150, 156–57 (1988); Commonwealth v. Lopes, 25 Mass. App. Ct. 988, 989 (1988) (rescript) (erroneous nondisclosure of defendant's oral statements, but no prejudice here); Commonwealth v. Themelis, 22 Mass. App. Ct. 754, 762–63 (1986) (no prejudice from change in prosecution witness testimony); Commonwealth v. Pope, 19 Mass. App. Ct. 627 (1985) (although Commonwealth did not disclose expert witness until trial, no prejudice because expert simply expanded on other witnesses' testimony rather than testifying to new subject matter); Commonwealth v. Lapka, 13 Mass. App. Ct. 24, 29–30 (1982) (failure to disclose defendant's admission nonprejudicial); Commonwealth v. Delaney, 11 Mass. App. Ct. 398, 403, 405 (1981) (prosecutor failed to provide name of alibi rebuttal witness, but no prejudice to defense, which was given opportunity to confer with witness); Commonwealth v. Blodgett, 377 Mass. 494, 499, 500-501 (1979) (judge properly precluded defense from calling alibi witnesses until he disclosed their names to Commonwealth);.