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

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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,*

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

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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]

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[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]

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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]

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[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

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[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

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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]

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[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*

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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]

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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]

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[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]

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[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]

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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,

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[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]

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[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.

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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

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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).

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:

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[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.

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[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,

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[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

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[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]

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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

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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

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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);.