CAP Discovery Presentation Documents

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April 10, 2012

Peter Engeian, RPA
Director of Operations - Landmark Center
Samuels & Associates Management, LLC
333 Newbury Street
Boston, MA 02115

Dear _____:

I am writing to request that you preserve all footage and photographs from the security camera mounted on the outside of the Landmark Center (near the Best Buy, facing the intersection) on March 17, 2012, from 9:00 p.m. to 11:00 p.m.

It is important that this information not be erased. The contents of this camera may be evidence in a federal lawsuit. In addition, investigation of these contents falls within the jurisdiction of federal law enforcement agencies. Knowingly destroying this evidence could subject you to criminal penalties under federal law. *See* 18 U.S.C. § 1519. If you have any questions about your legal obligations, you should consult counsel.

If the footage is to be recycled or destroyed for any reason, please notify me in advance so that I can preserve that footage at my expense. If you cannot or will not honor this request, please notify me of that fact within 5 days of your receipt of this letter. If I do not receive a response I will assume that you intend to preserve the evidence and that you will notify me sufficiently in advance of destroying it so that I can preserve it at my expense. I will assume you have directed your agents and employees to preserve this evidence so that it is not inadvertently destroyed, recycled, written over or other made nonretrievable.

If there is a cost to preserving the contents of this camera, please let me know. I am willing to pay any reasonable costs entailed in preserving or copying this footage.

If you have any questions about this request please call me.

Sincerely,

David Milton

STATE OF MICHIGAN
DEPARTMENT OF STATE POLICE
LANSING

RICK SNYDER
GOVERNOR

SEP 24 2012

COL. KRISTE KIBBEY ETUE
DIRECTOR

MR THOMAS BAYNTON
LAW OFFICE OF THOMAS BAYNTON
1430 MICHIGAN ST NE STE B
GRAND RAPIDS, MI 49503

RE: CR-57539-12, 60-520-12 12-1249 ST1 POUNTAIN, KENNETH

Dear MR BAYNTON:

The department has received your request for certain records and has processed it under the provisions of the Michigan Freedom of Information Act (FOIA), MCL 15.231 et seq.

The records you have requested have been:

☑ Granted.

☐ Granted in part and denied in part. Portions of your request are exempt from disclosure based on provisions set forth in the Act. (See comments on the back of this letter.) Under the FOIA, Section 10 (a copy of which is enclosed), you have the right to appeal to the head of this public body or to a judicial review of the denial.

☐ Denied. (See comments on the back of this letter.) Under the FOIA, Section 10 (a copy of which is enclosed), you have the right to appeal to the head of this public body or to a judicial review of the denial.

☐ The documents you requested are enclosed. Please pay the amount of $_____.

☑ Please pay the amount of $ 10.14. Once we receive payment the documents will be mailed to you.

Checks or money orders should be made payable to the STATE OF MICHIGAN and mailed to the address below. To ensure proper credit, please enclose a copy of this letter with your payment.

If you have questions concerning this matter, please feel free to contact our office at the address below, and enclose a copy of this correspondence.

Sincerely,

Carla Turner

Carla Turner
Assistant FOIA Coordinator
Michigan State Police

9/27 TC FOIA — Video + audio exists — no other info avail.
(Carla was not in today)

STATE OF MICHIGAN
DEPARTMENT OF STATE POLICE
LANSING

RICK SNYDER
GOVERNOR

COL. KRISTE KIBBEY ETUE
DIRECTOR

September 13, 2012

MR THOMAS BAYNTON
LAW OFFICE OF THOMAS BAYNTON
1430 MICHIGAN ST NE STE B
GRAND RAPIDS, MI 49503

NOTICE OF EXTENSION

RE: CR-57539-12 60-520-12 POUNTAIN, KENNETH

Dear MR BAYNTON:

The department has received your request for public records under the Michigan Freedom of Information Act (FOIA), MCL 15.231 et seq..

In order to determine whether the department possesses existing, non-exempt public records responsive to your request, we are extending the time for responding to your request by ten (10) business days, as permitted under MCL 15.235, Section 5(2)(d). Therefore, a written notice will be issued to you on or before 9/27/2012.

If you have any questions concerning this matter, please feel free to contact our office at (517) 241-1934, or at the address below, and enclose a copy of this correspondence.

Sincerely,

Carla Turner

Carla Turner
Assistant FOIA Coordinator
Michigan State Police

911 IONIA COUNTY CENTRAL DISPATCH
James B. Valentine, Director
545 Apple Tree Drive
Ionia, MI 48846
(616) 522-0911

September 13, 2012

Law Office of Thomas B. Baynton
1430 Michigan NE
Grand Rapids, MI 49503

RE: 911 Records Request
Kenneth Pountain

Dear Counselor Baynton:

Per your request received September 10, 2012, a search of our audiolog records was completed for all dispatches involving Trooper Nobliski from 12:03 p.m. to 12:25 p.m. on 8/7/2012. No such records were found via radio or telephone communications with a Trooper Nobliski on 8/7/2012.

Upon further inquiry with the Michigan State Police, East Lansing Special Operations, Trooper Nobliski is on the Hometown Security Team. I found a number for them on the MSP website and it is (517) 394-5588. East Lansing Special Operations said that requests for records should go through MSP Headquarters in Lansing at:

Michigan State Police
Criminal Justice Information Center
Attn: Freedom of Information Unit
333 S. Grand Avenue
P.O. Box 30634
Lansing, MI 48909-0634
(517) 332-2521

I hope that this information assists you with your search for information regarding the incident involving Mr. Pountain. Please do not hesitate to contact me if you have questions.

Sincerely,

Nancy Rodriguez

Nancy Rodriguez
Administrative Assistant

LAW OFFICE OF THOMAS B. BAYNTON

1430 Michigan NE • Grand Rapids , MI 49503 • (616) 456-6100 • Fax: (888) 245-7104

September 4, 2012

Records Department
Michigan State Police 6th District HQ
345 Northland Dr. NE
Rockford, MI 49341

RE: People v. Kenneth Pountain
Case # : 12-1249 ST1
Complaint #: 060-0000520-12 (HT)
Date of Offense: 8/7/12
Arresting Officer (s): Trooper Nobliski

To Whom It May Concern:

Please be advised that I have been retained to represent Mr. Pountain in the above captioned mater. I am seeking preservation and production of the following: **audio** of all dispatches involving Trooper Nobliski from 12:03 pm to 12:25 p.m. on 8/7/2012; **videos** of any of the following regarding the above mentioned case: the following, stop, and ticketing of the Defendant.

Last, I am asking that you notify me in writing as to whether said tape(s) exist.

Thank you in advance for your anticipated cooperation in this matter. I am willing to pay reasonable copying and material fees for these materials. Please forward an invoice for the copying and materials costs. Please do not hesitate to contact me if you have any questions.

Sincerely Yours,

Thomas B. Baynton

TBB/

F

LAW OFFICE OF THOMAS B. BAYNTON

1430 Michigan NE • Grand Rapids , MI 49503 • (616) 456-6100 • Fax: (888) 245-7104

September 5, 2012

FOIA Coordinator
Ionia County Central Dispatch
545 Apple Tree Drive
Ionia, MI. 48846

RE: People v. Kenneth Pountain
Case # : 12-1249 ST1
Complaint #: 060-0000520-12 (HT)
Date of Offense: 8/7/12
Arresting Officer (s): Trooper Nobliski

To Whom It May Concern:

Please be advised that I have been retained to represent Mr. Pountain in the above captioned mater. I am seeking preservation and production of the following: **audio** of all dispatches involving Trooper Nobliski from 12:03 pm to 12:25 p.m. on 8/7/2012;

Thank you in advance for your anticipated cooperation in this matter. I am willing to pay reasonable copying and material fees for these materials. Please forward an invoice for the copying and materials costs. Please do not hesitate to contact me if you have any questions.

Sincerely Yours,

Thomas B. Baynton

TBB/

ANDIS SVIKIS
Attorney at Law
3018 Oakland Drive
Kalamazoo, MI 49008

FREEDOM OF INFORMATION ACT REQUEST

Kalamazoo Department of Public Safety
150 East Crosstown Parkway
Kalamazoo, MI 49001

ANDIS SVIKIS
Attorney at Law

3018 Oakland Drive
Kalamazoo, MI 49008
Phone (269) 349-7692
Fax (269) 216-6358
andis@svikislaw.com

October 25, 2012

Kalamazoo Department of Public Safety
150 East Crosstown Parkway
Kalamazoo, MI 49001

FREEDOM OF INFORMATION ACT REQUEST

Re: People v

File No.

OCA

Please be advised that I have been appointed to represent INDIGENT _____ in the above entitled matter.

This is a request for the following as described in the police report and similarly marked within the prosecutor's file.

Pursuant to the Freedom of Information Act ("FOIA"), MCL 15.231 et seq., I request that you provide me with copies of the above records, writings, recordings, information and other items (e.g., video/audio tapes, photographs, etc.) within the time limit prescribed by MCL 15.235(2) (i.e., 5 business days):

Upon my receipt of the foregoing records and other items, I will honor your invoice for same pursuant to the FOIA's fee as limited by the indigent request policy.

Thank you for your cooperation in this matter, and please do not hesitate to contact me with any questions, comments, or concerns you may have.

Sincerely,

ANDIS SVIKIS LAW OFFICE

Andis Svikis

ANDIS SVIKIS
Attorney at Law
3018 Oakland Drive
Kalamazoo, MI 49008

FREEDOM OF INFORMATION ACT REQUEST

Kalamazoo Department of Public Safety
150 East Crosstown Parkway
Kalamazoo, MI 49001

ANDIS SVIKIS
Attorney at Law

3018 Oakland Drive
Kalamazoo, MI 49008
Phone (269) 349-7692
Fax (269) 216-6358
andis@svikislaw.com

October 25, 2012

Kalamazoo Department of Public Safety
150 East Crosstown Parkway
Kalamazoo, MI 49001

FREEDOM OF INFORMATION ACT REQUEST

Re: People v

File No.

OCA

Please be advised that I have been RETAINED to represent _____ in the above entitled matter.

This is a request for the following as described in the police report and similarly marked within the prosecutor's file.

Pursuant to the Freedom of Information Act ("FOIA"), MCL 15.231 et seq., I request that you provide me with copies of the above records, writings, recordings, information and other items (e.g., video/audio tapes, photographs, etc.) within the time limit prescribed by MCL 15.235(2) (i.e., 5 business days):

Upon my receipt of the foregoing records and other items, I will honor your invoice for same pursuant to the FOIA's fees.

Thank you for your cooperation in this matter, and please do not hesitate to contact me with any questions, comments, or concerns you may have.

Sincerely,

ANDIS SVIKIS LAW OFFICE

Andis Svikis

NICHOLS LAW FIRM
Attorneys At Law

August 3, 2012

Via Fax & U.S. Mail:
(517) 241-1935

Michigan Department of State Police
Criminal Justice Information Center
Freedom of Information Unit
P.O. Box 30634
Lansing, MI 48913

NAME: **NAME**
DATE OF INCIDENT: **DATE**
ARRESTING AGENCY: **COUNTY SHERIFF'S DEPARTMENT**
TICKET NO: **######**

RE: STATE OF MICHIGAN V NAME
FILE NO. ###########; JUDGE

Dear Sir or Madam:

Please be advised that this is a request for information pursuant to the Freedom of Information Act, MCLA 15.231, et seq. Please provide the following information:

1. A copy of any notes or logs produced by any Michigan State Police troopers, forensic scientists, lab technicians or agency officials involved in any way with this case;

2. Any and all documents pertaining to, but not limited to the analysis, collection and maintenance, of any blood or bodily fluids in the above referenced accident date, in regards to [client];

3. This request includes but is not limited to the calibration records for the headspace gas chromatograph used for 30 days before and after the analysis of the subject's blood;

4. Any and all data related to the analysis of the subject's blood;

5. Any and all log books, entries, input or data recorded in any log book in the toxicology/blood alcohol unit for 30 days before and 30 days after the testing of [client's] blood;

East Lansing office: 3452 E. Lake Lansing Road, East Lansing, MI 48823
Ithaca office: P.O. Box 188, Ithaca, MI 48847-0188
(517) 432-9000 ♦ (800) 550-5892 ♦ FAX (517) 203-4448 ♦ www.nicholslawyers.com

6. The daily runs including the external controls used for the day that the subject's blood was analyzed, including all results for all unknowns, standards and negative controls. The unknowns should be identified by their unique laboratory identification number;

7. Any and all data related to the analysis of control and reference material, including but not limited to aqueous control solutions, whole blood controls, clinical controls, and NIST certified reference materials

8. The raw data files and methods for the entire batch run, including but not limited to the controls, negatives and unknown samples. This request also includes any and all printouts of the screen for the gas chromatograph software depicting the peak prior to any adjustment of the baseline, whether or not the screen depicts "baseline drift";

    a. Please note that this request should be read to include, but is not limited to, the raw screen printout or reading prior to the interpolated result being prepared; in other words, the raw chromatogram. This may be provided via a "jump" drive or disc.

9. All lab notes, case files, case reports, log books or bench notes, by whatever name known, and in whatever form, as well as all documents contained in the testing folder specific to the test in this case. This includes a copy of the case or testing folder itself if it contains any notations or entries and all data and notes, including the chromatograms produced from all of the samples in this batch and run, not simply in this case, as well as the internal standards, standards, blanks, standard mixtures, verifiers, and controls run in the batch in which the sample in this case was run;

10. Any logs, reports or spreadsheets, or other documents, in whatever form, reflecting the results of the samples from this case, including but not limited to internal standards, standards, standard mixtures, verifiers, blanks, and controls run in the batch in which the sample in this case was run;

11. The calibration curves and all chromatographs generated on the batch on the machine on which the sample in this case was tested;

East Lansing office: 3452 E. Lake Lansing Road, East Lansing, MI 48823
Ithaca office: P.O. Box 188, Ithaca, MI 48847-0188
(517) 432-9000 ♦ (800) 550-5892 ♦ FAX (517) 203-4448 ♦ www.nicholslawyers.com

12. All logs, reports, spreadsheets, control charts, and other documents, in whatever form, reflecting the calibration of all equipment used in the testing and the preparation of the sample at issue in this case as well as the preparation of all samples within the batch;

13. All certificates of traceability for any and all certified reference material, standards, controls, and verifiers used to analyze this sample. This should include any quality control certificate provided by the supplier or manufacturer with, or applicable to, such solutions including reporting of uncertainty and all other raw data. This should also include any log entries, notes or annotations reflecting the use of these items to calibrate the instruments immediately prior to, during and after this run.

14. All certificates of traceability for the standards, controls, and verifiers used to analyze this sample. This should include any quality control certificate provided by the supplier or manufacturer with, or applicable to, such solutions including reporting of uncertainty and all other raw data;

15. Documents reflecting the expiration date of all externally purchased solutions or reagents used in the batch in which the sample in this case was tested; and

16. A complete written explanation as to the loss of any information requested above which was previously held by the Michigan Department of State Police, but is no longer available to the Department.

If any or this entire request is denied, please cite the specific exemption(s) which you think justifies your refusal to release the information and inform me of the appeal procedures available to me under the law.

Please respond to this request within 5 days of the date of this letter. If you have any questions, please feel free to call our office.

Very truly yours,

THE NICHOLS LAW FIRM, PLLC

East Lansing office: 3452 E. Lake Lansing Road, East Lansing, MI 48823
Ithaca office: P.O. Box 188, Ithaca, MI 48847-0188
(517) 432-9000 ♦ (800) 550-5892 ♦ FAX (517) 203-4448 ♦ www.nicholslawyers.com

NICHOLS LAW FIRM
Attorneys At Law

Michael J. Nichols

MJN:JLM
Cc: Client's Name, Defendant

East Lansing office: 3452 E. Lake Lansing Road, East Lansing, MI 48823
Ithaca office: P.O. Box 188, Ithaca, MI 48847-0188
(517) 432-9000 ♦ (800) 550-5892 ♦ FAX (517) 203-4448 ♦ www.nicholslawyers.com

NICHOLS LAW FIRM
Attorneys At Law

October 18, 2012

Via Fax & U.S. Mail:
(517) 241-1935

Michigan Department of State Police
Criminal Justice Information Center
Freedom of Information Unit
P.O. Box 30634
Lansing, MI 48913

NAME: **NAME**
DATE OF INCIDENT: **DATE**
ARRESTING AGENCY: **COUNTY SHERIFF'S DEPARTMENT**
TICKET NO: **######**

RE: STATE OF MICHIGAN V NAME
FILE NO. ##########; JUDGE

Dear Sir or Madam:

Please be advised that this is a request for information pursuant to the Freedom of Information Act, MCLA 15.231, et seq. Please provide the following information:

1. Any and all documents, records, notes or any other data generated by you or any other instruments that you used for work in the above captioned case;

2. Any and all data regarding the tuning and calibration of the gas chromatography / mass spectrometer used to measure any of the compounds of interest in this case;

3. Any and all standard operating procedures regarding the analysis and calibration for any of the compounds of interest in this case;

4. Any and all data regarding the limit of detection and limit of quantization for the gas chromatograph / mass spectrometer analysis used to measure any of the compounds of interest in this case;

5. Any and all data regarding the calibrators and reference materials, including manufacturer's certificates, used to measure any of the compounds of interest in this case;

East Lansing office: 3452 E. Lake Lansing Road, East Lansing, MI 48823
Ithaca office: P.O. Box 188, Ithaca, MI 48847-0188
(517) 432-9000 ♦ (800) 550-5892 ♦ FAX (517) 203-4448 ♦ www.nicholslawyers.com

6. Any and all raw data, including results and/or observations. This request includes but is not limited to results and observations recorded in log books for the calibrations of the spectrometers used in this case;

7. Any and all log books used to record calibrations or any other observations regarding the subject sample or calibrations in this case; and

8. Any and all corrective action reports from the American Society of Crime Laboratory Directors / Laboratory Accreditation Board (ASCLAD/LAB), or any other body that accredits you; and

9. A complete written explanation as to the loss of any information requested above which was previously held by you or the Michigan Department of State Police, but is no longer available to you or the Department.

If any or this entire request is denied, please cite the specific exemption(s) which you think justifies your refusal to release the information and inform me of the appeal procedures available to me under the law.

Please respond to this request within 5 days of the date of this letter. If you have any questions, please feel free to call our office.

Very truly yours,

THE NICHOLS LAW FIRM, PLLC

Michael J. Nichols

MJN:JLM

Cc: Client's name

East Lansing office: 3452 E. Lake Lansing Road, East Lansing, MI 48823
Ithaca office: P.O. Box 188, Ithaca, MI 48847-0188
(517) 432-9000 ♦ (800) 550-5892 ♦ FAX (517) 203-4448 ♦ www.nicholslawyers.com

FREEDOM OF INFORMATION ACT AUTHORIZATION

TO:

You and any person associated with you are hereby authorized and requested to furnish to this office or any representative of its office, with any and all information contained in my records and files that they may request. Photostatic copy of this authorization may serve in its stead.

_____ _____

Client Date

Subscribed and sworn to before me this _____ day of _____, 20___ .

_____

Notary Public,_____ County, MI.
My commission expires:_____

June 18, 2012

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED
ARTICLE NO.

*** Police Department
Attn: FOIA Administrator
****
****

Re: My Client: ****
Date of Incident:
Location of Incident:
Arresting Officer: ****, Badge No. ****

Dear Sir or Madam:

Please be advised that I have been retained to represent ****. Please consider this letter a request pursuant to Michigan's Freedom of Information Act, MCL 15.231, et. seq., as amended. Please send to my attention at the above address a copy of all records concerning my client, ****, listed below.

**** was stopped, detained, administered field sobriety tests, arrested, and transported to your lockup by ****, badge number ***. Once at your lockup, **** was booked and blood was drawn by an EMT after **** refused a breath test.

Please send me copies of the following:

1. Copies of audio recordings, video recordings, or both, if any, from **** 's scout car showing **** 's car being followed, stopped, or detained.

2. Copies of audio recordings, video recordings, or both, if any, from **** 's scout car showing **** being administered the field sobriety tests, and being arrested at the scene.

3. Copies of audio recordings, video recordings, or both, if any, from **** 's scout car while transporting **** to the Novi Police Department lockup, including any conversations between **** and **** .

4. Copies of any audio or visual tapes of **** while at the lockup and proceeding through the booking process.

As provided by §5(2) of the Act, I hope to receive these documents as soon as possible. Please therefore send copies of these tapes and documents to me within the time constraint allowed by that subsection. If you are unable to fulfil this request in that time limitation, please contact me at the above address in writing and inform me as to when I may expect to receive these requested items. If, however, you decide to deny this request in whole or in part, I expect to receive a written notification of this decision as provided in §5(4)(a) through §5(4)(d). If you charge a fee for this request, please advise and I will be happy to pay it.

If, however, you decline any part of this request, please ensure that you **PRESERVE ANY DOCUMENT, AUDIO OR VISUAL RECORDING, OR ANYTHING ELSE THAT YOU WITHHOLD.** Similarly, pursuant to ***People v Rosborough,*** 387 Mich 183 (1973), ***People v Petrella,*** 124 Mich App 745 (1983) and ***Arizona v Youngblood,*** 488 US 51 (1988), I am requesting that you preserve any and all audio or video recordings, or both, (either fragmentary or complete) generated in this case.

As always, if you have questions regarding this or anything else, please do not hesitate in contacting me.

Very truly yours,

Thomas M. Loeb
TML/ps

cc: ****

Dear Sir or Madam:

Please consider this letter a formal request pursuant to Michigan's Freedom of Information Act, MCLA 15.231, et. seq., as amended. Please send to my attention at the above address a copy of all records concerning my client, *, listed below. I enclose for your attention both a medical release authorization form and a Freedom of Information Act release authorization form. I trust you will find this sufficient.

Please send me copies of the following:

1. His personal and criminal history.

2. His physical description.

3. His arrest and fingerprint card.

4. Any medical records prepared either at his admission, during his confinement, or at his discharge, **INCLUDING X-RAYS**.

5. Any records concerning unusual behavior.

6. Any records that would indicate dates of misconduct or disciplinary action rendered to him, if any.

7. Any receipts concerning cash and valuables taken from him on commencement and returned to him on discharge.

8. His photos or mugshots.

9. Any logs or other records which would show with particularity where he was housed while at the * County Jail.

10. His visitor's list.

11. His phone log.

12. Any records concerning classification.

13. Any records concerning counseling or education.

14. Any records concerning any inmate medicines or prescribed medications administered to him.

15. Any other records concerning Mr. * not previously requested.

As provided by §5(2) of the Act, I hope to receive these documents as soon as possible. Although the Act requires that you respond to this written request within five working days I recognize that may

be unrealistic. Please therefore send photocopies of these documents to me within two weeks from receipt of this letter. If you are unable to fulfil this request in that time limitation, please contact me at the above address and phone or in writing and inform me as to when I may expect to receive these requested documents. If however you decide to deny this request in whole or in part, I expect to receive a written notification of this decision as provided in §5(4)(a) through §5(4)(d). If you charge a fee for this request, please advise and I will be happy to pay it.

Very truly yours,

Thomas M. Loeb
TML/mln
Enclosures

ORDER APPROVING PAYMENT OF AN INVESTIGATOR AT PUBLIC EXPENSE

At a session of said Court, held in the City of Detroit, Wayne County, Michigan on _____

PRESENT: HON._____
Circuit Court Judge

ON THE MOTION of the defendant, the court being fully advised,

IT IS ORDERED that payment to ****, (PD No. ***), a Licensed Private Investigator, is authorized at public expense, for services rendered to counsel for the Defendant in conducting an investigation as directed by said counsel, at an hourly rate of $*** ($***) Dollars an hour. Payment for said services at public expense shall not exceed the amount of $***

_____
Circuit Court Judge

Notice & hearing on entry of the above order is waived.

Approved as to form:

_____

Attorney for

ORDER FOR THE APPOINTMENT OF BALLISTICS EXPERT AT COUNTY EXPENSE

At a session of said court, held in the **********, on

_____

PRESENT:_____
Circuit Court Judge

Argument having been heard, and the court being fully advised;

IT IS ORDERED that the following person shall be appointed as defendant's independent ballistics expert at county expense as defendant is indigent:

***

IT IS FURTHER ORDERED that *** shall have an opportunity to examine the handgun presently held by the ******** Police Department on ******* and if he so desires, the bullets and fragments held on ******* and ********.

_____
CIRCUIT COURT JUDGE

Notice & hearing on entry of
the above order is waived.

Approved as to form:

_____

Attorney for

ORDER FOR SUPPLEMENTAL DISCOVERY--EMS RECORDS

At a session of said court, held in the Court House
in the City of Detroit, Wayne County, Michigan on

_____

PRESENT:_____
Circuit Court Judge

Argument having been heard, and the court being fully advised;

IT IS ORDERED that photocopies of ****'s records from Emergency Medical Service, (D.O.B. ***) for May 3, 1987 between 4:00 a.m. and 5:50 a.m. from 1647 Fairview, Detroit, Michigan be provided to defense counsel or his agent at county expense, as defendant is indigent.

_____
CIRCUIT COURT JUDGE

Notice & hearing on entry of
the above order is waived.

Approved as to form:

_____

Attorney for

ORDER FOR SUPPLEMENTAL DISCOVERY-- TESTING FOR FINGERPRINTS

At a session of said court, held in the Court House in the City of Detroit, Wayne County, Michigan, on _____

PRESENT:_____
Circuit Court Judge

IT IS ORDERED that a representative of the Detroit Police Department shall obtain possession of two beer cans presently being held by the complainant as evidence in the above entitled case. Upon obtaining the above-mentioned beer cans, these items shall be turned over to the officer in charge of this case for fingerprint testing. If any full or partial prints are obtained, they shall be compared with the defendant's fingerprints.

IT IS FURTHER ORDERED that any prints obtained from the above-mentioned beer cans shall be preserved for use as evidence until further order of this court.

IT IS FURTHER ORDERED that the above-described testing procedure shall be performed, and the testing results be made available to defense counsel, within _____ days from the date of this order.

_____
CIRCUIT COURT JUDGE

Notice & hearing on entry of the above order is waived.

Approved as to form:

_____

Attorney for

ORDER FOR APPOINTMENT OF INDEPENDENT PSYCHOLOGIST AT COUNTY EXPENSE

At a session of said court, held in the Court House in the City of Detroit, Wayne County, Michigan, on

_____

PRESENT:_____
Circuit Court Judge

Argument having been heard, and the court being fully advised;

IT IS ORDERED that the following person shall be appointed as defendant's independent psychologist and expert witness: ****

IT IS FURTHER ORDERED that **** shall be able to visit defendant at the Wayne County Jail in order to make a psychological evaluation of defendant and shall perform all necessary tests, interviews, investigations and examination that he feels appropriate.

IT IS FURTHER ORDERED that **** shall be compensated at county expense, as defendant is indigent.

_____
CIRCUIT COURT JUDGE

Notice & hearing on entry of the above order is waived.

Approved as to form:

_____

Attorney for

ORDER FOR PRODUCTION OF JAIL RECORDS AT COUNTY EXPENSE

At a session of said court, held in the Court House in the City of Detroit, Wayne County, Michigan, on _____

PRESENT:_____
Circuit Court Judge

Argument having been heard, and the court being fully advised;

IT IS ORDERED that the **** (Wayne County Sheriff's Department) shall produce and provide defense counsel with photocopies of the following records concerning inmate ****, Jail No. ***, at county expense, as defendant is indigent:

1. His personal and criminal history.

2. His physical description.

3. His arrest and fingerprint card.

4. Any medical records prepared either at his admission, during his confinement, or at his discharge, if any.

5. Any records concerning unusual behavior, if any.

6. Any records that would indicate dates of misconduct or disciplinary action rendered to him, if any.

7. Any receipts concerning cash and valuables taken from him on commitment, if any.

8. His photos or mugshots, if any.

9. Any logs or other records that would show with particularity where he was housed since confinement at the Wayne County Jail, if any.

10. Any records concerning classification, if any.

11. Any records concerning counseling or education, if any.

12. Any records concerning any inmate medicines or prescribed medications administered to him, if any.

13. Any other records concerning Mr. **** not previously requested, if any.

_____
CIRCUIT COURT JUDGE

Notice & hearing on entry of
the above order is waived.

Approved as to form:

_____

Attorney for

ORDER FOR SUPPLEMENTAL DISCOVERY--MEDICAL RECORDS

At a session of said court, held in the *, on _____

PRESENT:_____
Circuit Court Judge

Argument having been heard, and the court being fully advised;

IT IS ORDERED that photocopies of ****'s medical records, (DOB ***; ***Hospital case no. ***) be provided to defense counsel or his agent.

IT IS FURTHER ORDERED that this information be provided to defense counsel at county expense, as defendant is indigent.

_____
CIRCUIT COURT JUDGE

Notice & hearing on entry of
the above order is waived.

Approved as to form:

_____
**** County Assistant
Prosecuting Attorney

ORDER TO PRESERVE EVIDENCE - 911 TAPES

At a session of said court, held in the Court House in the City of Detroit, Wayne County, Michigan, on _____

PRESENT:_____
Circuit Court Judge

Argument having been heard, and the court being fully advised;

IT IS ORDERED that the **** Police Department shall attempt to find and preserve as evidence in this case the 911 tape recording of a telephone call allegedly made by the complainant, **** to 911 on Monday, January 19, 1987 between the hours of 1:00 and 3:00 a.m. regarding an alleged rape said to have occurred at 6320 West Lafayette, Detroit Michigan.

IT IS FURTHER ORDERED that the **** Police Department or the Prosecutor's Office shall make available to defense counsel the above-mentioned 911 tape recording, if any, within thirty (30) days from the date of this order.

_____
CIRCUIT COURT JUDGE

Notice & hearing on entry of
the above order is waived.

Approved as to form:

_____

Attorney for

STATE OF MICHIGAN
IN THE 3rd CIRCUIT COURT FOR THE COUNTY OF WAYNE

STATE OF MICHIGAN,

Plaintiff,

V

Court Case No. 12-703862-01
Hon. Lawrence S. Talon

MATTHEW SCOTT REEVES,

Defendant.

KYM WORTHY (P 38875)
Wayne County Prosecuting Attorney
1441 Saint Antoine St
Frank Murphy Hall of Justice
Detroit, MI 48226

SHANNON M. SMITH (P 68683)
Attorney for Defendant
7 West Square Lake Road, #157
Bloomfield Hills, MI 48302
(734) 218-1998

CHERYL CARPENTER (P 62721)
Attorney for Defendant
25742 Schoolcraft
Redford, MI 48239
(313) 541-9090

MOTION FOR EARLY RETURN OF SUBPOENA

NOW COMES Defendant, MATTHEW SCOTT REEVES, and for his Motion for Early Return of Subpoena states as follows:

1. The Defendant is charged with one count of fourth-degree criminal sexual conduct and one count of assault and battery and this matter is set for trial on November 8, 2012.

2. On February 8, 2012, Defendant Reeves visited the apartment of the complainant to sell her a life insurance policy. During the visit, the complainant alleges that Mr. Reeves assaulted her and touched her inappropriately.

3. During the interview, the complainant submitted to a telephone interview to get pre-approved for the life insurance policy. These telephone interviews are audio

recorded in case the insurance company needs any information for later use.

4. This audio recording will contain critical impeachment material necessary to the defense at trial.

5. Although the complainant's health history was discussed during the interview, this information is not privileged health information as it was disclosed in the presence of Mr. Reeves, thereby waiving any issue of privilege.

6. Defense Counsel intends to send a subpoena to the insurance company to obtain a copy of the audio recording which Defense Counsel intends to use as substantive evidence and for impeachment purposes.

7. Defense Counsel have been provided with discovery, and upon information and belief, this audio recording is not in the possession of the prosecution.

8. Defense Counsel would like to request an early return date on the Subpoena, however, in criminal trials, Counsel cannot subpoena materials unless a witness is directed to bring it to a Court hearing.

9. Counsel will serve the prosecutor with a copy of the subpoena and a copy of the audio recording and/or any information discovered as a result.

10. It is necessary for Defense Counsel to be prepared for trial in advance, and to share relevant information with the prosecution in advance of trial.

WHEREFORE, Defendant requests that Defense Counsel be allowed to subpoena a copy of the audio recording secured at the time of the life insurance interview on February 8, 2012 and have an early return date for the same.

Dated: August 2, 2012

Respectfully submitted,

_____
Shannon M. Smith (P 68683)
Cheryl Carpenter (P 62721)
Attorney for Defendant

NOTICE OF HEARING

Please take notice that on Friday, August 17, 2012, Defendant's Motion is scheduled to be heard the Wayne County Court before the Hon. Lawrence S. Talon.

Dated: August 2, 2012

Respectfully submitted,

_____
Shannon M. Smith
Cheryl Carpenter
Attorney for Defendant

PROOF OF SERVICE

I, Sheri Gallagher, hand-delivered a copy of the document above to the Assistant Prosecuting Attorney, Ralph Elizondo, on August 2, 2012.

Date: August 2, 2012

_____
Sheri Gallagher

STATE OF MICHIGAN
IN THE BERRIEN COUNTY TRIAL COURT – CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff

File No. 2010-016-301-FY
Hon. Scott Schofield

V

ALLEN DALE FERNATT,

Defendant.

MARY MALESKY (P 39138)
Assistant Prosecuting Attorney
1205 North Front Street
Niles, MI 49120
(269) 684-5274 x 6294

GAIL S. BENSON (P 25417)
Co-Counsel for Defendant
31099 E. Rutland St.
Beverly Hills, MI 48025
(248) 425-6789

SHANNON M. SMITH (P 68683)
Co-Counsel for Defendant
7 West Square Lake Road, #157
Bloomfield Hills, MI 48302
(248) 679-8917

MOTION FOR EARLY RETURN OF SUBPOENAS

NOW COMES Defendant, ALLEN DALE FERNATT, by and through his attorneys, Gail S. Benson and Shannon M. Smith, and for his Motion for Early Return of Subpoenas states as follows:

1. The Defendant is charged by Information with two counts of first degree criminal sexual conduct and one count of second degree criminal sexual conduct.

2. Defense counsel intend to subpoena various items for trial including the following:

a. Records from the cable company for the channels available at the Halliwell household (to be used for impeachment of Christine Halliwell and explain the complainant's access to pornography);

b. Information regarding Brooke Rospierski, who at this time is not identified as an expert witness, including but not limited to her curriculum vitae, any materials she relies on, information regarding seminars/trainings she has attended, copies of the research, articles or other materials that she believes to be significant or on which she relies on for her opinions and practice.

c. A police report from the Michigan State Police regarding an incident on March 21, 2009 that counsel believe was a false report filed by Christine Halliwell to show her pattern and practice of filing false reports. The Michigan State Police failed to produce a copy of the report when counsel attempted to obtain the same through a Freedom of Information Request and therefore, counsel will seek your Honor's signature on a subpoena for the same.

3. That pursuant to MCR 6.201, the discovery sought by Counsel is not prohibited discovery, as it is not protected from disclosure by constitution, statute or privilege.

4. That the non-confidential information counsel is seeking is not in the possession of the prosecutor or the police who investigated this case.

5. That counsel has filed separate motions regarding any discovery that may be considered privileged, protected or confidential ordinarily.

6. Counsel for Defendant expects the material they wish to subpoena to elicit extensive records due to the time frame stated in the Complaint and therefore request and early return date on the subpoena so that they may adequately review the same before trial.

7. Additionally, Counsel will serve the prosecutor with a copy of all subpoenas as well as copies of information discovered as a result.

WHEREFORE, for the reasons stated herein, Defendant asks this Court to enter an Order allowing defense counsel to have an early return date for non-confidential materials that will be obtained through subpoenas.

January 12, 2011 Respectfully submitted:

_____
Shannon M. Smith (P 68683)
Attorney

NOTICE OF HEARING

Please take notice that on Friday, January 21 at 8:30 a.m., Defendant's Motion is scheduled to be heard at the Berrien County Trial Court before the Honorable Scott Schofield. A hearing is already set for a case conference in this matter.

Dated: January 13, 2011 Respectfully submitted,

_____
Shannon M. Smith
Attorney for Defendant
7 West Square Lake Road, #157
Bloomfield Hills, MI 48302
(248) 679-8917

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF MICHIGAN

Plaintiff,

v

Case No. FC
Hon. Timothy Kenny

VIRGINIA HOMBERG

Defendant.
_____/

WAYNE COUNTY PROSECUTOR
1441 Saint Antoine St
Frank Murphy Hall of Justice
Detroit, MI 48226
(313) 224-5777

GAIL S. BENSON (P25417)
Co-Counsel for Defendant
31099 E. Rutland
Beverly Hills, Michigan 48025
(248) 647-0816

SHANNON M. SMITH (P 68683)
Co-Counsel for Defendant
7 West Square Lake Road, #157
Bloomfield Hills, MI 48302
(248) 679-8917
_____/

MOTION FOR EARLY RETURN OF SUBPOENAS

NOW COMES THE DEFENDANT, by and through her attorneys and for her Motion states as follows:

1. That Defendant is charged by Information with two counts of criminal sexual conduct in the first degree involving penile-vaginal penetration of a minor/student, two counts of criminal sexual conduct in the third degree involving penile-vaginal penetration of a student, and one count of distributing sexually explicit material.

2. That these offenses are alleged to have occurred between December 2007 and February 2010 and after the preliminary examination, some of the allegations are alleged to have taken place in the school where Defendant taught.

3. That in order to prepare for trial, below-signed Counsel intends to subpoena certain non-confidential materials for trial.

4. That pursuant to MCR 6.201, the discovery sought by Counsel is not prohibited discovery as it is not protected from disclosure by constitution, statute, or privilege.

5. That the non-confidential information counsel is seeking, including but not limited to Defendant's personnel file, school schedules and records, logs of visitors to the school, etc., is not in the possession of the prosecutor or the Garden City police.

6. That counsel will seek any confidential, privileged or protected discovery appropriately through separate motions before this Court and pursuant to *People v. Stanaway,* 446 Mich 643 (1994).

7. Counsel for Defendant expects the material they wish to subpoena to elicit extensive records due to the time frame stated in the Complaint and therefore request an early return on the subpoena so that they may adequately review the same before trial.

8. Additionally, Counsel will serve the prosecutor with a copy of all subpoenas as well and copies of any information discovered as a result.

WHEREFORE, for the reasons stated herein, Defendant asks this Court to enter an Order allowing defense counsel to have an early return date for non-confidential materials that will be obtained through subpoenas.

May 14, 2010

Respectfully submitted,

_____

Shannon Smith
Co-Counsel for Defendant

STATE OF MICHIGAN
IN THE 48th CIRCUIT COURT FOR THE COUNTY OF ALLEGAN

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff, File No. 11-[redacted]FH

v Hon. Kevin W. Cronin

[redacted] **JR.**,

Defendant.
_____/

Myrene K. Koch (P62570)
Allegan County Assistant Prosecutor
Attorney for Plaintiff
113 Chestnut Street
Allegan, Michigan 49010
(269) 673-0280

Keeley D. Heath (P68661)
Joshua Blanchard (P72601)
MIEL & CARR, PLC
Attorneys for Defendant
125 West Main Street
P.O. Box 8
Stanton, Michigan 48888
(989) 831-5208

_____/

DEFENDANT'S MOTION FOR DISCOVERY OF COMPLAINANT'S MEDICAL AND MENTAL HEALTH RECORDS

Defendant, by and through his attorneys, MIEL & CARR, PLC, by Keeley D. Heath, moves this Honorable Court to grant his Motion for Discovery of the Complainant's Medical and Mental Health Records, and in support states as follows:

1. Defendant, [redacted] Jr., is charged with Criminal Sexual Conduct in the Third Degree, two counts, contrary to MCL 750.520d(1)(a); Criminal Sexual Conduct in the Second Degree, one count, contrary to MCL 750.520c; and Accosting, Enticing, or Soliciting Child for Immoral Purposes, one count, contrary to MCL 750.145a, subject to enhanced sentence as a habitual offender fourth.

2. Defendant has maintained throughout this prosecution that he has been falsely charged, and that the alleged sexual contact did not occur.

3. On information and belief, the Complainant in this matter may suffer from bi-polar disorder and oppositional defiant disorder.

4. On information and belief, the Complainant in this matter has been admitted into a mental institution.

5. On information and belief, the Complainant in this matter has ongoing problems related to depression and anger management.

6. Defendant requests that the government turn over the psychological, medical, and other records of the Complainant. The defense requests any and all treatment records of the Complainant, including but not limited to psychological records, and medical records. *People v Stanaway*, 446 Mich. 643 (1994); MCR 6.201(C)(2).

7. To the extent that the government and/or the Complainant asserts that any of these records are privileged, then the defense hereby demands that the government turn these records over to the Court for an in camera review by the Judge in this Case. *Id.*

8. In addition, to the extent that the government has access to information such as these records, due process, fundamental fairness, and the constitutional right to confront witnesses require that the defense be entitled to equal access - even when that information is protected by privilege. US Const., Am V, VI, & XIV; Const 1963, art 1, §§ 17 & 20.

9. Defendant is entitled to the above information as part of the Discovery in this case.

WHEREFORE, for all the above reasons, Defendant moves this Honorable Court to grant Defendant's motion and order the Government to turn over the Complainant's medical and mental health records to defense counsel; or in the alternative, conduct an in camera review of the records, and turn over all relevant portions of the records to defense counsel.

Respectfully Submitted,

MIEL & CARR, PLC
Attorneys for Defendant

Dated: March 16, 2011

_____
Keeley D. Heath (P68661)

MIEL & CARR PLC
ATTORNEYS AT LAW

STATE OF MICHIGAN
IN THE 48th CIRCUIT COURT FOR THE COUNTY OF ALLEGAN

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff, File No. 11-17090-FH

v Hon. Kevin W. Cronin

[redacted] **JR.**,

Defendant.
_____/

Myrene K. Koch (P62570)
Allegan County Assistant Prosecutor
Attorney for Plaintiff
113 Chestnut Street
Allegan, Michigan 49010
(269) 673-0280

Keeley D. Heath (P68661)
Joshua Blanchard (P72601)
MIEL & CARR, PLC
Attorneys for Defendant
125 West Main Street
P.O. Box 8
Stanton, Michigan 48888
(989) 831-5208
_____/

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR DISCOVERY OF COMPLAINANT'S MEDICAL AND MENTAL HEALTH RECORDS

The issue of whether discovery should be allowed in a criminal case should be judged from the standpoint of whether fundamental fairness to the Defendant, in preparing his defense, requires that he have access to the requested information. *People v Fournier,* 86 Mich. App. 768, 784 (1978). The trend in Michigan and other states is toward broader criminal discovery. The Prosecutor is not merely a participant in a contest, but has a duty to seek justice. *People v Browning,* 108 Mich. App. 281, 307 (1981).

Defendant, [redacted] Jr., is charged with Criminal Sexual Conduct in the Third Degree, two counts, contrary to MCL 750.520d(1)(a); Criminal Sexual Conduct in the Second Degree, one count, contrary to MCL 750.520c; and Accosting, Enticing, or Soliciting Child for Immoral Purposes, one count, contrary to MCL 750.145a, subject to enhanced sentence as a habitual offender fourth. Mr. [redacted] has maintained throughout this prosecution that he has been falsely charged, and that the alleged sexual contact did not occur.

Complainant, as evidenced by the sexual assault examination report, has a possible diagnosis of bi-polar disorder. Further, the government has information that Complainant has previously been hospitalized in a mental institution after suffering from suicidal ideations. The report also reveals that the complaining witness takes several medications, including Abilify and Zoloft, both of which are used to treat psychiatric disorders.

The government's case is predicated entirely upon the credibility of the Complainant in this case. The fact that the Complainant has a serious mental illness, for which she may or may not have been medicated at the time of the allegations in this case, is entirely relevant to the defense of this case. Because the government's case rests largely, if not entirely, on the credibility of the Complainant, it is necessary for Defendant to discover the medical and mental health records of the Complainant.

Pursuant to the Michigan and Federal Constitutions, the right of Defendant to confront witnesses against him, to have a fair trial, to the effective assistance of counsel, and due process require that Defendant be afforded the opportunity to obtain the Complainant's medical and mental health records which might indicate that she is not being truthful in making these allegations. Given the serious nature of this case, this evidence is not only relevant, but vital, to evaluating the guilt or innocence of Defendant. Any privilege provided by statute or otherwise concerning the records yields to Defendant's right to present his defense.

Privileges have not been readily endorsed or broadly construed by the courts. *Howe v Detroit Free Press, Inc.*, 440 Mich. 203, 487 N.W.2d 374 (1992). The Michigan Supreme Court stated: "[W]hile assurance of confidentiality may encourage relationships of trust, privileges inhibit rather than facilitate the search for truth." *People v Stanaway*, 446 Mich. 643, 658, 521 N.W.2d 557, 565 (1994).

In *Stanaway,* the Michigan Supreme Court stated defendants have a due process right to obtain evidence if it is favorable to the accused and material to guilt or punishment. The

defendant in *Stanaway* was charged with three counts of third degree criminal sexual conduct, and the Michigan Supreme Court held that where a defendant can establish a reasonable probability that privileged records of psychologists, sexual assault counseling, or social workers are likely to contain information necessary to the defense, an in camera review of those records must be conducted to determine whether they contain evidence that is reasonably necessary to the defense. *People v Stanaway*, 446 Mich. 643, 521 N.W.2d 557 (1994).

In this case, it is by the government's own acknowledgment in their previously provided examination reports that we know that there is evidence in these records that is favorable to the Defendant's case. First, the government acknowledges that the Complainant suffers from bi-polar disorder. Secondly, the government further acknowledges that the Complainant has been previously admitted as a patient in a mental institution. Finally, the government admits that the Complainant is prescribed various psychiatric drugs. There is most certainly a reasonable probability that these records will contain evidence that is reasonably necessary to the defense.

Disclosure of the Complainant's records is material to Defendant's guilt or innocence. Defendant has a due process right to a fair trial and non-disclosure of these vital records is a violation of his due process rights. In this case, any privilege asserted must yield to Defendant's due process rights because it would interfere with the search for the truth. At the very least, Defendant is entitled to an in camera review of the records to determine whether the information contained in them is material to his defense.

In determining whether evidence is favorable to the accused and material to his guilt, the U.S. Supreme Court has interpreted material to mean exculpatory evidence that would raise a reasonable doubt about the defendant's guilt. *United States v Agurs*, 427 U.S. 97, 104, 96 SCt 2392, 2397-98 (1976). In this case, the information contained in the Complainant's records relate to her mental illness and a propensity to be spiteful or revengeful and blame others for her own mistakes.

The Michigan Supreme Court stated that testimonial exclusionary rules and privileges must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has public good transcending the normally predominant principal of utilizing all rational means for ascertaining the truth. *People v Love,* 425 Mich. 691, 391 N.W.2d 738 (1986). Here, ascertaining the Complainant's history of mental illness overrides any public good arising from any privilege.

WHEREFORE, for all the above reasons, Defendant moves this Honorable Court to grant Defendant's motion and order the Government to turn over the Complainant's medical and mental health records over to defense counsel; or in the alternative, conduct an in camera review of the records, and turn over all relevant portions of the records to defense counsel.

Respectfully Submitted,

MIEL & CARR, PLC
Attorneys for Defendant

Dated: March 16, 2011

_____
Keeley D. Heath (P68661)

STATE OF MICHIGAN
IN THE DISTRICT COURT FOR THE 19TH JUDICIAL DISTRICT

PEOPLE OF THE CITY OF DEARBORN,

Plaintiff,

vs.

ANTONIO TYRONE ROBINSON,

Defendant,

Case Nos. 08C1131-OM;
08C1132-OM;
08C1133-OM;
08C1134-OM; and
08T243611-OI.
Hon. Mark W. Somers

_____/

WILLIAM M. DEBIASI (P35892)
Assistant City Attorney
Dearborn Law Department
13615 Michigan Avenue
Dearborn, MI 48126
(313) 943-2035

JOHN F. ROYAL (P27800)
Attorney for Defendant
615 Griswold, Suite 1724
Detroit, Michigan 48226
(313) 962-3738

_____/

NOTICE OF HEARING

MOTION FOR DISCOVERY

BRIEF IN SUPPORT OF MOTION FOR DISCOVERY

PROOF OF SERVICE

STATE OF MICHIGAN
IN THE DISTRICT COURT FOR THE 19TH JUDICIAL DISTRICT

PEOPLE OF THE CITY OF DEARBORN,
Plaintiff,

vs.

ANTONIO TYRONE ROBINSON,
Defendant,
_____/

Case Nos. 08C1131-OM;
08C1132-OM;
08C1133-OM;
08C1134-OM; and
08T243611-OI.
Hon. Mark W. Somers

WILLIAM M. DEBIASI (P35892)
Assistant City Attorney
Dearborn Law Department
13615 Michigan Avenue
Dearborn, MI 48126
(313) 943-2035

JOHN F. ROYAL (P27800)
Attorney for Defendant
615 Griswold, Suite 1724
Detroit, Michigan 48226
(313) 962-3738
_____/

NOTICE OF HEARING

TO: William M. Debiasi
Assistant City Attorney
13615 Michigan Avenue
Dearborn, Michigan 48126

TAKE NOTICE that the MOTION FOR DISCOVERY in the above-entitled matter will be heard before the Honorable Mark W. Somers in his courtroom in the 19th District Court, 16077 Michigan Avenue, Dearborn, Michigan 48126, on Monday, September 22, 2008 at 8:00 a.m. or as soon thereafter as counsel may be heard.

Respectfully submitted,

_____
JOHN F. ROYAL (P27800)
Attorney for Defendant Robinson
615 Griswold, Suite 1724
Detroit, Michigan 48226
(313) 962-3738

DATED: October 18, 2012

STATE OF MICHIGAN

IN THE DISTRICT COURT FOR THE 19TH JUDICIAL DISTRICT

PEOPLE OF THE CITY OF DEARBORN,
Plaintiff,

vs.

ANTONIO TYRONE ROBINSON,
Defendant,

Case Nos. 08C1131-OM;
08C1132-OM;
08C1133-OM;
08C1134-OM; and
08T243611-OI.
Hon. Mark W. Somers

_____/

WILLIAM M. DEBIASI (P35892)
Assistant City Attorney
Dearborn Law Department
13615 Michigan Avenue
Dearborn, MI 48126
(313) 943-2035

JOHN F. ROYAL (P27800)
Attorney for Defendant
615 Griswold, Suite 1724
Detroit, Michigan 48226
(313) 962-3738

_____/

PROOF OF SERVICE

STATE OF MICHIGAN)
)SS
COUNTY OF WAYNE)

John F. Royal, being first duly sworn, deposes and says that on the 12th day of September, 2008, he served a copy of the MOTION FOR DISCOVERY; BRIEF IN SUPPORT OF MOTION FOR DISCOVERY, NOTICE OF HEARING and PROOF OF SERVICE in the above-entitled matter by personally serving same upon: William Debiasi, Assistant City Attorney, 13615 Michigan Avenue, Dearborn, Michigan 48126.

Subscribed and sworn to before me
this 12th day of September, 2008.

_____
John F. Royal

_____
Notary Public

STATE OF MICHIGAN

IN THE DISTRICT COURT FOR THE 19TH JUDICIAL DISTRICT

PEOPLE OF THE CITY OF DEARBORN,

Plaintiff,

vs.

ANTONIO TYRONE ROBINSON,

Defendant,

Case Nos. 08C1131-OM;
08C1132-OM;
08C1133-OM;
08C1134-OM; and
08T243611-OI.
Hon. Mark W. Somers

_____/

WILLIAM M. DEBIASI (P35892)
Assistant City Attorney
Dearborn Law Department
13615 Michigan Avenue
Dearborn, MI 48126
(313) 943-2035

JOHN F. ROYAL (P27800)
Attorney for Defendant
615 Griswold, Suite 1724
Detroit, Michigan 48226
(313) 962-3738

_____/

MOTION FOR DISCOVERY

NOW COMES Antonio Robinson, by and through his attorney, John F. Royal, and respectfully moves this Court to enter an Order of Discovery in the above entitled proceedings for the following reasons:

1. The Defendant Antoinio Tyrone Robinson (hereinafter: "Mr. Robinson') is charged with four city ordinance violations and one city traffic civil infraction in two separate Citations.

2. In Citation No. 243611 Mr. Robinson is charged in Count I with the civil infraction of

"Disregard Red Signal" in violation of Section "18" (Case No. 08T243611-OI) (the Citation does not cite a specific Ordinance Sub-Section, but cites the entire traffic code, Ordinance Section 18) . In Count II of Citation 243611, Mr. Robinson is charged with "Fail to Obey," in violation of Dearborn Ordinance "14-38 A" (Case No. 08-C1131-OM) (the Citation apparently alleges a violation of Section 14-38(a), entitled: "Resisting a Police Officer"). In Count III of Citation 243611 Mr. Robinson is charged with "VPHC-Marijuana," in violation of Section 14-158 (Case No. 08-1132-OM).

3. In Citation No. 243612, Mr. Robinson is charged in Count I with "Resist and Oppose Police", in violation of Section 14-38 (Case No. 08-1133-OM). In Count II of Citation 243612, Mr. Robinson is charged with "Refused Booking," in violation of Section "14" (Case No. 08-1134-OM) (the Citation does not specify what Ordinance sub-section Mr. Robinson is charged with violating with respect to this allegation).

4. The information sought herein is relevant to the question of the innocence or guilt of the Defendant.

5. Without the matters requested, the Defendant would be denied effective assistance of counsel, due process of law, and the right to the compulsory process of witnesses, since the ability to present a defense to the charges brought would be restricted.

6. Discovery makes the truth easier to determine.

7. The requested items and information are believed to be in the possession of the City of Dearborn or its agents, and cannot be examined prior to trial other than by Order of this Court.

8. This Motion is made in good faith and not for the purposes of delay.

9. The Defendant is able to pay the costs of any ordered discovery.

10. The Defendant understands that it is the position of the Dearborn City Attorney's office that there is no discovery in city ordinance cases. The Defendant urges the Court that this position is completely unsound and cannot possibly be the law. See Memorandum of Law in Support of this Motion, which is attached hereto and incorporated herein by reference.

11. The Defendant hoped to avoid having to file this Motion, and therefore proceeded to seek discovery through the Freedom of Information Act (FOIA) procedure which is preferred by the City Attorney.

12. Mr. Robinson submitted his first FOIA request to the City of Dearborn on April 29, 2008. This request asked for copies of the police reports pertaining to Mr. Robinson's arrest and pertaining to a breath alcohol test which was administered to him while he was in police custody, and also a copy any relevant videotapes, including the scout car videotape. The City extended the time to respond pursuant to the FOIA to May 22, 2008. Mr. Robinson then received the requested police reports, except he did not receive any reports relating to the breath alcohol test which he had been given. Further, Mr. Robinson was informed that, effective September 18, 2007, the Dearborn Police Department no longer utilized an in-car video system. Mr. Robinson also learned from the police reports that a drug detection dog named "Cuba" had been utilized in an attempt to obtain probable cause to search the interior of the car he had been driving when arrested.

13. Mr. Robinson thereupon submitted a second FOIA request to the City of Dearborn, dated May 30, 2008, which requested the following:

1. Copies of the Dearborn Police Department BAC Datamaster and Preliminary Breath Test (PBT) logs for April 10, 2008.

2. Copies of the following documents relating to the narcotics detection dog named "Cuba" (his handler is Cpl. Edward Doulette):

(A) All training, testing, and certification records for "Cuba":

(B) All records showing "Cuba's" performance either in the field, or in training or practice sessions, including every instance where "Cuba" has alerted, and whether each alert was false -positive or accurate-positive;

(C) All weekly maintenance and/or structured maintenance training records for "Cuba;" and

(D) All medical and/or veterinary records regarding "Cuba."

(3) Copies of any documents of the Dearborn Police Department indicating that any of the officers involved in the arrest, transportation, and booking of Antonio Robinson, on April 10, 2008, sought or received any type of medical treatment as a result of any injuries allegedly received during this incident; including: Cpls. David Finazzo (No. 458), Aaron Hicks (No. 432), Ball (No. 403), Edward Doulette (No. 414), Brian Kapanowski (No. 440), Darryl Paputa (No. 296), Robert Price (No. 368), Jonathan Dekiere (No. 408), and Carpenter; Sgts. Gary Mann (No. 357) and John Boettger (No. 258); Police Officers Cyle Gizicki (No. 510), Foyid Mockbil (No. 406), Robert Nicklowitz (No. 277), and John Wolf (No. 402),

(4) Copies of any documents of the Dearborn Police Department showing any findings of misconduct and/or any discipline ever imposed by the Dearborn Police Department, for any reason whatsoever, with respect to any of the officers involved in the arrest, transportation, and booking of Antonio Robinson on April 10, 2008, including the following police officers: Cpls. David Finazzo (No. 458), Aaron Hicks (No. 432), Ball (No. 403), Edward Doulette (No. 414), Brian Kapanowski (No. 440), Darryl Paputa (No. 296), Robert Price (No. 368), Jonathan Dekiere (No. 408), and Carpenter; Sgts. Gary Mann (No. 357) and John Boettger (No. 258); Police Officers Cyle Gizicki (No. 510), Foyid Mockbil (No. 406), Robert Nicklowitz (No. 277), and John Wolf (No. 402).

14. The City of Dearborn extended the time for responding to this request to June 23, 2008.

However, Mr. Robinson did not receive any response until he received a letter dated June 26, 2008, which read in pertinent part as follows:

> Your request for records has been received and reviewed. The cost to comply with your request is estimated to be $150.00. Since this amount is in excess of $50.00, a deposit of one-half of the estimated cost, or $75.00, is required. Before the records are provided to you, the balance due must be paid. . . .
> The response date for complying with your request will be determined from the date of receipt of your payment. No action will be taken regarding the request until the deposit is received.

> You will be contacted when the documents are ready and the balance due has been calculated. [Emphasis Added]

15. There was no indication in this letter dated June 26, 2008 that the City of Dearborn intended to refuse to comply with any of the requests set forth in Mr. Robinson's second FOIA request. Based upon this response, Mr. Robinson believed in good faith that the City intended to provide all of the requested information. Therefore, Mr. Robinson promptly provided the requested deposit of $75.00 which was enclosed in a letter dated July 2, 2008.

16. Mr. Robinson's attorney heard nothing further until the end of July, 2008. At that time, he initiated contact with the staff working on FOIA requests for Assistant City Attorney Ellerbrake. At that time, Mr. Robinson was asked to limit the scope in time of the records he was requesting regarding the tracking dog "Cuba." After consulting with the defense drug detection dog expert, Mr. Robinson agreed to limit his request to records compiled within the last two years. During these telephone communications, no one from the City of Dearborn even hinted that the City would not be providing most of the records requested regarding the tracking dog "Cuba."

17. Finally, by letter mailed on August 29, 2008, the day before the Labor Day weekend, the City responded to Mr. Robinson's FOIA request of May 30, 2008. This letter stated as follows:

> Your request for records has been received and reviewed. After reviewing the records, it has been determined that a portion of the requested records are exempt from disclosure for the following reasons:
>
> 1. Copies of the BAC Datamaster log for April 10, 2008 - enclosed;
> 2. Cuba training and medical records (A, C, and D) - exempt pursuant to MCL 15.234(1)(b)(v) and (1)(t); records showing Cuba's performance in the field - - enclosed;
> 3. Injury to officer records - do not exist;
> 4. Police personnel files - exempt pursuant to MCL 15.243(1)(t).

18. This letter was not received by Mr. Robinson's attorney until September 2, 2008. Mr. Robinson and his attorney were shocked at the numerous request which the City refused to respond

to, but promptly made arrangements to pick up the limited records which were provided on September 4, 2008. Mr. Robinson's attorney then consulted with the defense drug detection dog expert as to how to proceed.

19. Therefore, Mr. Robinson brings the instant motion requesting disclosure of the records which the City refused to disclose pursuant to the FOIA, and, in addition, certain additional information which is essential to the defense of Mr. Robinson.

20. Mr. Robinson relies on the attached Memorandum of Law in support of this Motion, which is incorporated herein by reference. Mr. Robinson also relies on and incorporates herein by reference his Motion to Suppress the Evidence, Motion for Judicial Determination of Legality of Arrest and Whether Officers Were Performing Their Duties, and Motion for Evidentiary Hearing, and Memorandum of Law in Support, which is being filed simultaneously with the instant motion**.**

WHEREFORE, the Defendant requests that an Order be entered compelling the prosecution to disclose and provide copies at Defendant's expense of the following, the duty of disclosure ordered herein to be a continuing one:

(1) Copies of the following documents relating to the narcotics detection dog named "Cuba" (his handler is Cpl. Edward Doulette):

(A) All training, testing, and certification records for "Cuba":

(C) All weekly maintenance and/or structured maintenance training records for "Cuba;" and

(D) All medical and/or veterinary records regarding "Cuba."

(2) Copies of any documents of the Dearborn Police Department showing any findings of misconduct and/or any discipline ever imposed by the Dearborn Police Department, for any reason whatsoever, with respect to any of the officers involved in the arrest, transportation, and booking of Antonio Robinson on April 10, 2008, including the following police officers: Cpls. David Finazzo (No. 458), Aaron Hicks (No. 432), Ball (No. 403), Edward Doulette (No. 414), Brian Kapanowski (No. 440), Darryl Paputa (No. 296), Robert Price (No. 368), Jonathan Dekiere (No. 408), and Carpenter; Sgts. Gary Mann (No. 357) and John Boettger (No. 258); Police Officers Cyle Gizicki (No. 510), Foyid Mockbil (No. 406), Robert

Nicklowitz (No. 277), and John Wolf (No. 402).

(3) The following information:

(A) The identify of the superior officer who supervises Cpl. Edward Doulette with respect to the drug detection dog "Cuba;"

(B) Copies of records showing the training and certification of both Cpl. Edward Doulette and his supervisor with respect to the training and handling of drug detection dogs;

(C) Copies of the sections of any Dearborn Police Department manuals which relate to the deployment, training, handling and certification of the police officers who handle drug detection dogs.

(4) The names of the officers who were present when Mr. Robinson was administered a breath alcohol test in connection with this matter.

(5) Copies of any written reports or memoranda whatsoever which in any way refer to the breath alcohol test which Mr. Robinson was given in connection with this case.

WHEREFORE, Mr. Robinson requests that his Motion for Discovery be granted.

Respectfully submitted,

JOHN F. ROYAL (P27800)
Attorney for Defendant Robinson
615 Griswold, Suite 1724
Detroit, Michigan 48226
(313) 962-3738

DATED: September 12, 2008

STATE OF MICHIGAN

IN THE DISTRICT COURT FOR THE 19TH JUDICIAL DISTRICT

PEOPLE OF THE CITY OF DEARBORN,

Plaintiff,

vs.

ANTONIO TYRONE ROBINSON,

Defendant,

Case Nos. 08C1131-OM;
08C1132-OM;
08C1133-OM;
08C1134-OM; and
08T243611-OI.
Hon. Mark W. Somers

_____/

WILLIAM M. DEBIASI (P35892)
Assistant City Attorney
Dearborn Law Department
13615 Michigan Avenue
Dearborn, MI 48126
(313) 943-2035

JOHN F. ROYAL (P27800)
Attorney for Defendant
615 Griswold, Suite 1724
Detroit, Michigan 48226
(313) 962-3738

_____/

BRIEF IN SUPPORT OF MOTION FOR DISCOVERY

Statement of Facts

The facts are those set forth in the attached Motion for Discovery.

Arguments

I. THERE IS CLEARLY DISCOVERY IN MICHIGAN ORDINANCE VIOLATION CASES, PURSUANT TO BOTH THE UNITED STATES AND MICHIGAN CONSTITUTIONS, AND PURSUANT TO MICHIGAN COMMON LAW.

The Dearborn City Attorney maintains that there is no discovery whatsoever in ordinance criminal prosecutions. This position is fallacious, absurd, and contrary to the U.S. Constitution, the Michigan Constitution, and Michigan Common Law. Mr. Robinson's attorney believes that the Dearborn City Attorney is basing its position upon Michigan Supreme Court Administrative Order 99-3, which reads as follows:

> **ADMINISTRATIVE ORDER 1999-3**
> **DISCOVERY IN MISDEMEANOR CASES**
>
> On order of the Court, in the case of People v Sheldon, 234 Mich App 68; 592 NW2d 121 (1999) (COA Docket No. 204254), the Court of Appeals ruled that MCR 6.201., which provides for discovery in criminal felony cases, also applies to criminal misdemeanor cases. That ruling was premised on an erroneous interpretation of our Administrative Order No. 1994-10. By virtue of this Administrative Order, we wish to inform the bench and bar that MCR 6.201 applies only to criminal felony cases. Administrative Order No. 1994-10 does not enlarge the scope of applicability of MCR 6.201. See MCR 6.001(A) and (B).

The clear import of Supreme Court Administrative Order 1999-3 is to advise the bench and bar of the state that MCR 6.201 only applies to felony prosecutions, and does not apply to misdemeanor or ordinance prosecutions. But nowhere does the Supreme Court state that there is no discovery in misdemeanor or ordinance violation cases.

Most of the Michigan Rules of Criminal Procedure (MCR Chapter 6, MCR 6.001 – 6.937) were adopted effective October 1, 1989. MCR 6.201, dealing with Discovery in felony cases, was not adopted until January 1, 1995. The City contends that if MCR 6.201 does not apply to ordinance violations, then this means that there is no discovery at all in misdemeanor criminal cases. But if this were the case, then it would necessarily follow that there would be no discovery

in felony cases if MCR 6.201 did not exist. But if this were the case, *then there would have been no discovery in felony criminal cases between October 1, 1989 and January 1, 1995, during the five years before MCR 6.201 was enacted.* Clearly, this was not the case. Discovery in felony criminal cases took place during those years pursuant to Michigan Common Law, the U.S. Constitution and the Michigan Constitution.

In stating that MCR 6.201 does not apply to misdemeanor and criminal ordinance cases, the Supreme Court has simply left discovery in these cases to develop through case law, based upon (1) the Common Law of Michigan, and (2) the applicable constitutional protections.

Michigan common law establishes that defendants charged with criminal misdemeanor and city ordinance violations are entitled to discovery in order to prepare their defense. The two leading Michigan cases which establish the right to discovery in criminal ordinance and misdemeanor prosecutions are: In Re Bay Prosecutor, 109 Mich App 476 (1981), and City of Harbor Springs v McNabb, 150 Mich App 583 (1986). In Re Bay Prosecutor, supra, at 484-85, cites People v Aldridge, 47 Mich App 639, 646 (1973) as controlling Michigan authority which defines the required scope of: "the disclosure of evidence valuable to defendant…." Aldridge is one of the leading Michigan cases on the right of a defendant to discovery in a criminal case.

City of Harbor Springs, supra, at 584-85, cites In Re Bay Prosecutor as its controlling authority, and specifically refers to the doctrine of "fundamental fairness" as defining the scope of the disclosure required by the prosecution in ordinance prosecutions. These published cases have established by precedent that the prosecution must provide discovery in criminal misdemeanor or ordinance violation cases where it is fundamentally fair to do so, and where disclosure of the evidence would be valuable to the defendant.

Further, the constitutional discovery rules established by Brady v Maryland, 373 U.S. 83 (1963); United States v Agurs, 427 U.S. 94 (1976); United States v Bagley, 473 U.S. 667 (1985); and Kyles v Whitley, 514 U.S. 419 (1995) also clearly apply to ordinance violation cases. These cases are based on the Due Process clause. U.S. Const. Ams. V, XIV. Michigan's Constitution provides the same protection under its own Due Process clause. Mich Const. 1963, Art. 1, Sec. 17. It is now well established that Due Process requires that the government not suppress evidence in criminal cases that is favorable to the accused or that discredits its own case. Upon request by a defendant, the government must disclose all such information. Brady, supra,; Agurs, supra. Brady "is based on the requirement of due process" and as such is a rule of fairness and minimum prosecutorial obligation. United States v Bagley, 473 U.S. 667 (1985). The obligation to disclose exculpatory information and evidence is defined by Brady and progeny; this obligation of disclosure is not limited by state court rules, case law, or standard operating procedures. Further, these rules of disclosure apply to all criminal prosecutions, not just to felony prosecutions.

For these reasons, this Court should grant the requested discovery.

II. THE GENERAL PRINCIPLES OF MICHIGAN CRIMINAL DISCOVERY REQUIRE THAT THE DISCOVERY SOUGHT HERE SHOULD BE GRANTED.

> The legal concept of a criminal trial has changed considerably in modern times. It is seen less as an arena where two lawyer gladiators duel with the accused's fate hanging on the outcome and more as an inquiry primarily directed toward the fair ascertainment of truth. People v Johnson, 356 Mich 619, 621 (1959).

In order best to promote fairness, the search for truth must be a meaningful one for a person accused of a crime. For the search to be meaningful, the discovery granted must be early enough and sufficiently broad to offset so far as practicable the advantages of time, investigative resources, investigating agents and money enjoyed by the prosecution. This motion is brought in order to

insure that the discovery made here is as broad as the law requires and that the trial in this case seeks "the fair ascertainment of truth."

Traditionally, discovery in criminal cases was limited. However, beginning in approximately 1970, the scope of discovery in criminal cases has expanded until it is now the prosecutor's recognized "duty ... to furnish all the evidence within his [sic] power bearing upon the issue of guilt or innocence in relation to the main issue or to give some good excuse for not doing so.'" People v Wimberly, 384 Mich 62, 66 (1970). In Wimberly, the Supreme Court upheld the trial court's grant of transcripts of the grand jury testimony of four witnesses, and in so doing reaffirmed the requirement of open discovery:

> We are mindful of the deeply rooted traditions of grand jury secrecy represented throughout Michigan case law. Nevertheless, we observe the emergent trend towards the broadest form of discovery in both criminal and civil trials and the prosecutor's duty to produce at trial **all** of the evidence relevant to the defendant's guilt or innocence. 384 Mich at 65 (bold in original; other emphasis added).

Similarly, in People v Eddington, 53 Mich App 200 (1974), People v Walton, 71 Mich App 478 (1976), People v Florinchi, 84 Mich App 128 (1978); People v Hayward, 98 Mich App 332 (1980), People v Browning, 108 Mich App 281 (1981) (on reh), In Re Bay Prosecutor, 109 Mich App 476 (1981), and City of Harbor Springs v McNabb, 150 Mich App 583 (1986), the Court of Appeals has approved "Michigan's increasingly progressive approach to criminal discovery ... [with] its foundation in the trial judge's inherent discretionary powers." Eddington, supra, 53 Mich App at 202. The Court of Appeals in Hayward, supra, explained why broad discovery is so important to the trial process:

> Discovery is becoming an increasingly important aspect of criminal trials ... a defendant's access to pre-trial discovery should be encouraged if it will aid in the ascertainment of the truth and will ensure defendant's fundamental right to a fair trial. ... When a prosecutor suppresses pre-trial

statements that are material to defense preparation, non-disclosure will be considered at least prejudicial, ... and perhaps a violation of due process. 98 Mich App at 366 (cites omitted).

Browning further expands on the policy considerations in support of broad discovery, emphasizing that "the prosecutor is not merely a participant in a contest, but is one with a duty to seek justice." 108 Mich App at 307.

In Florinchi, the Court of Appeals spoke again to the breadth of discovery that should be granted, reiterating that "discovery is not necessarily limited to evidence admissible at trial, but may extend to any information necessary to the preparation of the defense." 84 Mich App at 134. Reminding prosecutors that "suppression by the prosecution of evidence favorable to the accused is a violation of due process," the court went on to state that

> favorable evidence is ... all "evidence which ... might have led the jury to entertain a reasonable doubt about ... guilt." ... The test should be liberally construed especially when "substantial room for doubt" exists as to the effect disclosure might have.
>
> See also People v Walton, 71 Mich App 478, 481 (1976).

As summed up by the Court of Appeals in People v Thornton, 80 Mich App 746, 750 (1978), the modern trend is toward "complete discovery in criminal cases -- at least discovery of materials held by the prosecution." The controlling interests requiring that defendant be given access to all information are fairness to the defendant and an adequate opportunity to prepare a defense, including preparation for cross-examination of witnesses. It is also crucial that disclosure be made sufficiently broad and sufficiently in advance of trial to be useful to the defense and to enable counsel to render effective and efficient assistance. For these reasons, the discovery requested herein should be granted.

III. THE SPECIFIC DISCOVERY REQUESTS MADE HEREIN SHOULD BE GRANTED.

(1) Discovery of information concerning the drug detection dog, "Cuba" and his handlers.

Mr. Robinson requests discovery be provided of the following information regarding the drug detection dog "Cuba" and his handlers:

(1) Copies of the following documents relating to the narcotics detection dog named "Cuba" (his handler is Cpl. Edward Doulette):
(A) All training, testing, and certification records for "Cuba":
(C) All weekly maintenance and/or structured maintenance training records for "Cuba;" and
(D) All medical and/or veterinary records regarding "Cuba."

(3) The following information:
(A) The identify of the superior officer who supervises Cpl. Edward Doulette with respect to the drug detection dog "Cuba;"
(B) Copies of records showing the training and certification of both Cpl. Edward Doulette and his supervisor with respect to the training and handling of drug detection dogs;
(C) Copies of the sections of any Dearborn Police Department manuals which relate to the deployment, training, handling and certification of the police officers who handle drug detection dogs.

This is a specific request for exculpatory information. In Mr. Robinson's Motion to Suppress the Evidence, Motion for Judicial Determination of Legality of Arrest and Whether Officers Were Performing Their Duties, and Motion for Evidentiary Hearing, and Memorandum of Law in Support, which is being filed simultaneously with the instant motion**,** and is incorporated herein by reference, he explains that he has retained an expert in the training and handling of drug detection dogs, Mr. Steven D. Nicely of "K9 Consultants of America." Mr. Robinson seeks to have Mr. Nicely review Cuba's training, certification, handling, and medical records to determine whether "Cuba" has been properly trained and certified so that a positive alert from Cuba provides probable cause to conclude that marijuana can be found in a motor vehicle. This involves consideration of a myriad of issues, some of which are summarized in Mr. Robinson's Memorandum of Law in

support of his Motion to Suppress. Without the records which Mr. Robinson has requested through FOIA, and which are being requested herein, Mr. Nicely cannot form an opinion as to whether the training and certification of Cuba meets professional standards, such that a positive alert provides probable cause to conclude that marijuana can be found in a motor vehicle. Therefore, discovery of the records requested is essential in order to Mr. Robinson to determine if he needs to present Mr. Nicely's testimony to the Court during the evidentiary hearing he has requested in connection with his Motion to Suppress.

Therefore, the requested discovery should be granted.

(2) Discovery of Police Disciplinary Records of the Arresting, Transporting and Booking Officers.

Mr. Robinson requests discovery be provided of the following information concerning the officers who arrested, transported, and booked him, as follows:

> 4. Copies of any documents of the Dearborn Police Department showing any findings of misconduct and/or any discipline ever imposed by the Dearborn Police Department, for any reason whatsoever, with respect to any of the officers involved in the arrest, transportation, and booking of Antonio Robinson on April 10, 2008, including the following police officers: Cpls. David Finazzo (No. 458), Aaron Hicks (No. 432), Ball (No. 403), Edward Doulette (No. 414), Brian Kapanowski (No. 440), Darryl Paputa (No. 296), Robert Price (No. 368), Jonathan Dekiere (No. 408), and Carpenter; Sgts. Gary Mann (No. 357) and John Boettger (No. 258); Police Officers Cyle Gizicki (No. 510), Foyid Mockbil (No. 406), Robert Nicklowitz (No. 277), and John Wolf (No. 402).

In this case, Mr. Robinson contends, among other things, that he is being prosecuted based on police misconduct. Therefore, the Defendant is requesting information regarding past complaints against the same Officers accusing them of misconduct of a similar nature, together with the records of the investigations of such complaints, and records of the results of such

investigations. The defendant seeks to determine whether these officers have demonstrated a pattern or practice of abusing the rights of civilians. Such evidence, if discovered, would be admissible as evidence of similar acts of misconduct, MRE 404(b), or of habit, MRE 406.

The Michigan Court of Appeals in People v Walton, 71 Mich App 478, 480-81, 484-86 (1976) squarely held that the records of internal police investigations into complaining witness police officers are discoverable when they are potentially material to the preparation of the defense case. Here, the Defendant contends in part that he is being prosecuted based on police misconduct. Under these circumstances, the discovery sought is relevant and material, and should be provided

Further, the Brady doctrine has been specifically expanded by the U.S. Supreme Court to provide that the government has an obligation to disclose information that might be used to impeach its witnesses. In United States v Bagley, supra, the Court stated:

> In the present case, the prosecutor failed to disclose evidence that the defense might have used to impeach Government's witnesses by showing bias or interest. Impeachment evidence, however, as well as exculpatory evidence, falls within the Brady rule....Such evidence is "evidence favorable to an accused," ... so that if disclosed and used effectively, it may make the difference between conviction and acquittal. 473 U.S. at 676, 105 S CT at 3380, 87 LEd2d at 490 (citations omitted).

The importance of Mr. Robinson's request for impeachment evidence cannot be overemphasized. The Supreme Court explained the rationale behind requiring Government disclosure of information bearing upon the credibility of its witnesses as well as matters more directly material of guilt or innocence in Napue v Illinois, 360 US 264, 269, 79 S Ct 1173, 3 LEd2d 1217 (1959):

> The jury's estimate of the truthfulness and reliability of a given witness may be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.

In Kyles v Whitley, 115 S.Ct. 1555 (1995), the Court emphasized the responsibilities of the prosecutor to disclose possible exculpatory evidence, and also made it clear that the Court will not raise the threshold of the materiality standard based on the possible difficulty a prosecutor might have in identifying what evidence may become important at trial.

Mr. Robninson recognizes that there is a governmental and personal interest in the confidentiality of the personnel records in question. Therefore, the Defendant-Appellant suggests that this Court follow the procedure set forth in People v Stanaway 446 Mich 643, 678-684 (1994), cert. den. 513 U.S. 1121 (1995). This Court should order the production of the personnel records of both Deputies from both the Sheriff's Department and the Detroit Police Department for an *in camera* inspection. If this inspection discloses information that is arguably admissible on behalf of the Mr. Robinson, then this Court should Order disclosure of the relevant records to Mr. Robinson, with appropriate safeguards, as provided by Stanaway, supra.

For these reasons, the disclosure requested herein is required by the doctrine of Brady v Maryland, and progeny, and by the common law of Michigan, specifically In Re Bay Prosecutor, supra, and City of Harbor Springs, supra, and should be granted.

(3) Discovery of records of the Breath Alcohol Test which was administered to Mr. Robinson.

Mr. Robinson requests discovery be provided of the following information relating to the breath alcohol test which was administered to him:

(4) The names of the officers who were present when Mr. Robinson was

administered a breath alcohol test in connection with this matter.

(5) Copies of any written reports or memoranda whatsoever which in any way refer to the breath alcohol test which Mr. Robinson was given in connection with this case.

The video which was provided of the Police Department booking area clearly shows Mr. Robinson being administered a breath alcohol test. The video shows Mr. Robinson in the company of two Dearborn police officers, one Caucasian and one African American. One of the officers gives Mr. Robinson an object, which he places up to his mouth. One of the officers told him he was breathing into a "breathalyzer." Mr. Robinson does not know what type of device it was. But one of the officers looked at the device, and said that Mr. Robinson was not drunk.

The identify of the officers who administered this test and the results are clearly relevant exculpatory evidence, in light of the statements in the police reports that Mr. Robinson appeared to be under the influence of alcohol. Mr. Robinson is seeking the identify of the officers who administered this test, as well as any Police Department documentation of this procedure, which is shown on the video. Mr. Robinson intends to subpoena these officers both for the Evidentiary Hearing to be held this matter, and for trial.

Therefore, the requested discovery should be granted.

IV. CONCLUSION

This Court has full authority to order the requested discovery, and should do so.

WHEREFORE, Mr. Robinson requests that his Motion for Discovery be granted.

Respectfully submitted,

JOHN F. ROYAL (P27800)
Attorney for Defendant Robinson
615 Griswold, Suite 1724
Detroit, Michigan 48226
(313) 962-3738

DATED: September 12, 2008

STATE OF MICHIGAN

IN THE DISTRICT COURT FOR THE 41A JUDICIAL DISTRICT
SHELBY TOWNSHIP DIVISION

THE PEOPLE OF THE STATE OF MICHIGAN

Plaintiff,

vs. Case No. 02-31213-SD
Hon. Douglas Shepard

THOMAS MICHAEL MERRITT

Defendant.
_____/

MACOMB COUNTY PROSECUTOR
Attorney for the Plaintiff

LAW OFFICES OF MICHAEL L. STEINBERG
By: Michael L. Steinberg (P43481)
Attorney for the Defendant
319 North Gratiot
Mount Clemens, MI 48043
(586) 783-1010
_____/

MOTION TO DISMISS DUE TO FAILURE TO PRODUCE CRITICAL EVIDENCE

NOW COMES, Defendant, THOMAS MICHAEL MERRITT, by and through his retained counsel, MICHAEL L. STEINBERG and MOVES to DISMISS the case in the above captioned matter. In support thereof he states:

1. On or about 15 October 2002, Defendant was arrested by Macomb County Sheriff's Deputy Ronald Murphy under the suspicion of drunk driving.

2. On 23 October 2002, Defendant retained counsel, who

then promptly forwarded a letter to the Sheriff's Department and the prosecutor's office, seeking the preservation and production of the "at scene" and booking videos, along with the preservation and production of log sheets. See attached.

3. On 26 November 2002, Counsel contacted a booking sergeant at the Macomb County Sheriff's Department and was informed that the video had been retained and turned over to the prosecution.

4. Soon thereafter, Counsel received a general, nos specific letter from the Office of Corporation Counsel acknowledging that a recent Freedom of Information Act request was made and that the since the case was under investigation that all requests would have to be forwarded to the prosecutor's office.

5. Counsel has attempted to contact corporation counsel several times to learn what has become of the requested evidence and to date has never had any phone messages returned.

6. Counsel has been in contact with the prosecutor's office several times and has had to procure two adjournments in the hope that these items would be produced.

7. The requested material is crucial to the Defendant's case in that it is a real time memorialization of the events that lead to his arrest. Because the video has an audio feature it would reflect his voice inflection and his demeanor toward the arresting officer. This would clearly impeach the information that has been put forth in the police report and that would be put forth at trial.

8. Defendant cannot safely proceed to trial without this material.

WHEREFORE Defendant being without any other relief except as provided by this Honorable Court respectfully requests that it GRANT and provide any other relief it deems just and fair.

Respectfully submitted,

_____

LAW OFFICES OF MICHAEL L. STEINBERG

By: Michael L. Steinberg (P43481)
Attorney for the Defendant
319 North Gratiot
Mount Clemens, MI 48043
(586) 783-1010

Dated: 23 April 2003

PROOF OF SERVICE-VIA FACSIMILE

MICHAEL L. STEINBERG, being first duly sworn, deposes and says that on the 23rd day of April 2003, he personally served a copy of the within Motion, Brief, Notice of Hearing and Proof of Service upon a representative of the Macomb County Prosecutor's Office, via FACSIMILE at telephone number (586) 469-5608.

_____

MICHAEL L. STEINBERG

STATE OF MICHIGAN

IN THE DISTRICT COURT FOR THE 41A JUDICIAL DISTRICT
SHELBY TOWNSHIP DIVISION

THE PEOPLE OF THE STATE OF MICHIGAN

Plaintiff,

vs.

Case No. 02-31213-SD
Hon. Douglas Shepard

THOMAS MICHAEL MERRITT

Defendant.
_____/

MACOMB COUNTY PROSECUTOR
Attorney for the Plaintiff

LAW OFFICES OF MICHAEL L. STEINBERG
By: Michael L. Steinberg (P43481)
Attorney for the Defendant
319 North Gratiot
Mount Clemens, MI 48043
(586) 783-1010
_____/

BRIEF IN SUPPORT OF MOTION TO DISMISS

A failure to preserve potentially useful evidence is a denial of due process when bad faith is present. Arizona v Youngblood, 488 US 51 ; 109 S Ct 333; 102 L Ed 2d 281 (1988), *rehearing denied* 488 US 1051 ; 109 S Ct 885; 102 L Ed 2d 1007 (1989). Bad faith is suggested by a lack of earnest effort to locate evidence. People v Eddington 53 Mich App 200(1974); People v Kelson 71 Mich App 410 (1976). Youngblood also recognized that police are not obligated to perform particular scientific tests *when alternative methods of proof are available,* like an officer's personal observation of drunk driving. *Youngblood,* 488 US at 59.

Yet, the constitutional duty to preserve evidence "must be limited to evidence that might be expected to play a significant role in the suspect's defense." California v Trombetta, 467 US 479, 488; 104 S Ct 2528; 81 L Ed 2d 413 (1984). Specifically, evidence must be preserved if it has exculpatory value that is known before the evidence is destroyed and if it is of "such a nature

that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* at 489. "This due process requirement of disclosure applies to evidence that might lead a jury to entertain reasonable doubt about a defendant's guilt." People v Lester 232 Mich App 262, 280 (1998) [citing Giglio v US, 405 US 150, 154; 92 S Ct 763; 31 L Ed 2d 104 (1972)].

The Court of Appeal has recognized that due process is violated when destruction of evidence was deliberate; whether there had been a request for the production of the same and whether the evidence would have been useful to the defense. People v Petrella, 123 Mich App 745(1983) *aff'd on other grounds*, 424 Mich 221 (1985). More importantly, in People v Amison 70 Mich App 70, 77 (1976), the Court of Appeals discussed three factors in considering issues of police destruction or suppression of evidence. First, "suppression" of evidence is considered more egregious if it occurs after a defense request for the evidence. Id at 77-78. In the case at bar, this evidence was promptly requested and has been requested again several times to the point that adjournments had to be obtained in order to attempt to procure the evidence.

Second, the evidence must be of a "favorable character for the defense." Favorable evidence is defined as "evidence which ... might had led the jury to entertain a reasonable doubt about ... guilt." In the instant case, an actual real time recording of the demeanor, performance on field sobriety tests and, if the camera was operating before the traffic stop was effectuated, demonstrating Mr. Merritt's ability to operate his vehicle would all be evidence that would lead to reasonable doubt. Defendant insist that his ability to operate his vehicle was not impaired and that he performed well on the tests. When the evidence is destroyed and cannot be examined by the defense, it is impossible "make a precise determination" as to whether it could not have led the jury to entertain a reasonable doubt.

Third, the evidence must be material. Evidence is material if it "could ... in any reasonable likelihood have affected the judgment of the jury." *Id* at 77. Here, the materiality of the evidence is beyond dispute. It is an actual real time depiction of the conduct of the defendant and was

extraordinarily probative of the very issue before the court. That is whether his ability to operate his vehicle was materially impaired due to the consumption of intoxicating liquors.

The Amison Court recognized that the grossly negligent loss of evidence was grounds for suppression. In that case, they found that the Appellant had not met the burden set forth above. In the instant case, the request for preservation and production of the videos and logs was made eight days after the defendant was arrested. A letter was sent to the law enforcement agency and the prosecution. A follow up call indicated that the material had been preserved and turned over to the prosecution. A further amorphous letter from corporation counsel indicated that the material was within the purview of the prosecution. Several requests to the prosecutor have failed to produce the requested material.

For these reasons, Defendant's Motion to Dismiss must be granted.

Respectfully submitted,

LAW OFFICES OF MICHAEL L. STEINBERG
By: Michael L. Steinberg (P43481)
Attorney for the Defendant
319 North Gratiot
Mount Clemens, MI 48043
(586) 783-1010

Dated: 23 April 2003

Arguments

I. THERE IS CLEARLY DISCOVERY IN MICHIGAN ORDINANCE VIOLATION CASES, PURSUANT TO BOTH THE UNITED STATES AND MICHIGAN CONSTITUTIONS, AND PURSUANT TO MICHIGAN COMMON LAW.

The Dearborn City Attorney maintains that there is no discovery whatsoever in ordinance criminal prosecutions. This position is fallacious, absurd, and contrary to the U.S. Constitution, the Michigan Constitution, and Michigan Common Law. Defendant's attorney believes that the Dearborn City Attorney is basing its position upon Michigan Supreme Court Administrative Order 99-3, which reads as follows:

ADMINISTRATIVE ORDER 1999-3
DISCOVERY IN MISDEMEANOR CASES

> On order of the Court, in the case of People v Sheldon, 234 Mich App 68; 592 NW2d 121 (1999) (COA Docket No. 204254), the Court of Appeals ruled that MCR 6.201., which provides for discovery in criminal felony cases, also applies to criminal misdemeanor cases. That ruling was premised on an erroneous interpretation of our Administrative Order No. 1994-10. By virtue of this Administrative Order, we wish to inform the bench and bar that MCR 6.201 applies only to criminal felony cases. Administrative Order No. 1994-10 does not enlarge the scope of applicability of MCR 6.201. See MCR 6.001(A) and (B).

The clear import of Supreme Court Administrative Order 1999-3 is to advise the bench and bar of the state that MCR 6.201 only applies to felony prosecutions, and does not apply to misdemeanor or ordinance prosecutions. But nowhere does the Supreme Court state that there is no discovery in misdemeanor or ordinance violation cases.

Most of the Michigan Rules of Criminal Procedure (MCR Chapter 6, MCR 6.001 – 6.937) were adopted effective October 1, 1989. MCR 6.201, dealing with Discovery in felony cases, was not adopted until January 1, 1995. The City contends that if MCR 6.201 does not apply to ordinance violations, then this means that there is no discovery at all in misdemeanor criminal cases. But if this were the case, then it would necessarily follow that there would be no discovery in felony cases

if MCR 6.201 did not exist. But if this were the case*, then there would have been no discovery in felony criminal cases between October 1, 1989 and January 1, 1995, during the five years before MCR 6.201 was enacted.* Clearly, this was not the case. Discovery in felony criminal cases took place during those years pursuant to Michigan Common Law, the U.S. Constitution and the Michigan Constitution.

In stating that MCR 6.201 does not apply to misdemeanor and criminal ordinance cases, the Supreme Court has simply left discovery in these cases to develop through case law, based upon (1) the Common Law of Michigan, and (2) the applicable constitutional protections.

Michigan common law establishes that defendants charged with criminal misdemeanor and city ordinance violations are entitled to discovery in order to prepare their defense. The two leading Michigan cases which establish the right to discovery in criminal ordinance and misdemeanor prosecutions are: In Re Bay Prosecutor, 109 Mich App 476 (1981), and City of Harbor Springs v McNabb, 150 Mich App 583 (1986). In Re Bay Prosecutor, supra, at 484-85, cites People v Aldridge, 47 Mich App 639, 646 (1973) as controlling Michigan authority which defines the required scope of: "the disclosure of evidence valuable to defendant…." Aldridge is one of the leading Michigan cases on the right of a defendant to discovery in a criminal case.

City of Harbor Springs, supra, at 584-85, cites In Re Bay Prosecutor as its controlling authority, and specifically refers to the doctrine of "fundamental fairness" as defining the scope of the disclosure required by the prosecution in ordinance prosecutions. These published cases have established by precedent that the prosecution must provide discovery in criminal misdemeanor or ordinance violation cases where it is fundamentally fair to do so, and where disclosure of the evidence would be valuable to the defendant.

Further, the constitutional discovery rules established by Brady v Maryland, 373 U.S. 83

(1963); United States v Agurs, 427 U.S. 94 (1976); United States v Bagley, 473 U.S. 667 (1985); and Kyles v Whitley, 514 U.S. 419 (1995) also clearly apply to ordinance violation cases. These cases are based on the Due Process clause. U.S. Const. Ams. V, XIV. Michigan's Constitution provides the same protection under its own Due Process clause. Mich Const. 1963, Art. 1, Sec. 17. It is now well established that Due Process requires that the government not suppress evidence in criminal cases that is favorable to the accused or that discredits its own case. Upon request by a defendant, the government must disclose all such information. Brady, supra,; Agurs, supra. Brady "is based on the requirement of due process" and as such is a rule of fairness and minimum prosecutorial obligation. United States v Bagley, 473 U.S. 667 (1985). The obligation to disclose exculpatory information and evidence is defined by Brady and progeny; this obligation of disclosure is not limited by state court rules, case law, or standard operating procedures. Further, these rules of disclosure apply to all criminal prosecutions, not just to felony prosecutions.

For these reasons, this Court should grant the requested discovery.

II. THE GENERAL PRINCIPLES OF MICHIGAN CRIMINAL DISCOVERY REQUIRE THAT THE DISCOVERY SOUGHT HERE SHOULD BE GRANTED.

> The legal concept of a criminal trial has changed considerably in modern times. It is seen less as an arena where two lawyer gladiators duel with the accused's fate hanging on the outcome and more as an inquiry primarily directed toward the fair ascertainment of truth. People v Johnson, 356 Mich 619, 621 (1959).

In order best to promote fairness, the search for truth must be a meaningful one for a person accused of a crime. For the search to be meaningful, the discovery granted must be early enough and sufficiently broad to offset so far as practicable the advantages of time, investigative resources, investigating agents and money enjoyed by the prosecution. This motion is brought in order to insure that the discovery made here is as broad as the law requires and that the trial in this case seeks

"the fair ascertainment of truth."

Traditionally, discovery in criminal cases was limited. However, beginning in approximately 1970, the scope of discovery in criminal cases has expanded until it is now the prosecutor's recognized "duty ... to furnish all the evidence within his [sic] power bearing upon the issue of guilt or innocence in relation to the main issue or to give some good excuse for not doing so.'" People v Wimberly, 384 Mich 62, 66 (1970). In Wimberly, the Supreme Court upheld the trial court's grant of transcripts of the grand jury testimony of four witnesses, and in so doing reaffirmed the requirement of open discovery:

> We are mindful of the deeply rooted traditions of grand jury secrecy represented throughout Michigan case law. Nevertheless, we observe the emergent trend towards the broadest form of discovery in both criminal and civil trials and the prosecutor's duty to produce at trial **all** of the evidence relevant to the defendant's guilt or innocence. 384 Mich at 65 (bold in original; other emphasis added).

Similarly, in People v Eddington, 53 Mich App 200 (1974), People v Walton, 71 Mich App 478 (1976), People v Florinchi, 84 Mich App 128 (1978); People v Hayward, 98 Mich App 332 (1980), People v Browning, 108 Mich App 281 (1981) (on reh), In Re Bay Prosecutor, 109 Mich App 476 (1981), and City of Harbor Springs v McNabb, 150 Mich App 583 (1986), the Court of Appeals has approved "Michigan's increasingly progressive approach to criminal discovery ... [with] its foundation in the trial judge's inherent discretionary powers." Eddington, supra, 53 Mich App at 202. The Court of Appeals in Hayward, supra, explained why broad discovery is so important to the trial process:

> Discovery is becoming an increasingly important aspect of criminal trials ... a defendant's access to pre-trial discovery should be encouraged if it will aid in the ascertainment of the truth and will ensure defendant's fundamental right to a fair trial. ... When a prosecutor suppresses pre-trial statements that are material to

> defense preparation, non-disclosure will be considered at least prejudicial, ... and perhaps a violation of due process. 98 Mich App at 366 (cites omitted).

Browning further expands on the policy considerations in support of broad discovery, emphasizing that "the prosecutor is not merely a participant in a contest, but is one with a duty to seek justice." 108 Mich App at 307.

In Florinchi, the Court of Appeals spoke again to the breadth of discovery that should be granted, reiterating that "discovery is not necessarily limited to evidence admissible at trial, but may extend to any information necessary to the preparation of the defense." 84 Mich App at 134. Reminding prosecutors that "suppression by the prosecution of evidence favorable to the accused is a violation of due process," the court went on to state that

> favorable evidence is ... all "evidence which ... might have led the jury to entertain a reasonable doubt about ... guilt." ... The test should be liberally construed especially when "substantial room for doubt" exists as to the effect disclosure might have.
>
> See also People v Walton, 71 Mich App 478, 481 (1976).

As summed up by the Court of Appeals in People v Thornton, 80 Mich App 746, 750 (1978), the modern trend is toward "complete discovery in criminal cases -- at least discovery of materials held by the prosecution." The controlling interests requiring that defendant be given access to all information are fairness to the defendant and an adequate opportunity to prepare a defense, including preparation for cross-examination of witnesses. It is also crucial that disclosure be made sufficiently broad and sufficiently in advance of trial to be useful to the defense and to enable counsel to render effective and efficient assistance. For these reasons, the discovery requested herein should be granted.

III. THE SPECIFIC DISCOVERY REQUESTS MADE HEREIN SHOULD BE GRANTED.

(1) Discovery of information concerning the drug detection dog, "Cuba" and his handlers.

Defendant requests discovery be provided of the following information regarding the drug detection dog "Cuba" and his handlers:

(1) Copies of the following documents relating to the narcotics detection dog named "Cuba" (his handler is _____ _____)

(A) All training, testing, and certification records for "Cuba":

(C) All weekly maintenance and/or structured maintenance training records for "Cuba;" and

(D) All medical and/or veterinary records regarding "Cuba."

(3) The following information:

(A) The identify of the superior officer who supervises _____ _____with respect to the drug detection dog "Cuba;"

(B) Copies of records showing the training and certification of both _____and his supervisor with respect to the training and handling of drug detection dogs;

(C) Copies of the sections of any Dearborn Police Department manuals which relate to the deployment, training, handling and certification of the police officers who handle drug detection dogs.

This is a specific request for exculpatory information. In Defendant's Motion to Suppress the Evidence, Motion for Judicial Determination of Legality of Arrest and Whether Officers Were Performing Their Duties, and Motion for Evidentiary Hearing, and Memorandum of Law in Support, which is being filed simultaneously with the instant motion**,** and is incorporated herein by reference, he explains that he has retained an expert in the training and handling of drug detection dogs, Mr. Steven D. Nicely of "K9 Consultants of America." Defendant seeks to have Mr. Nicely review Cuba's training, certification, handling, and medical records to determine whether "Cuba" has been properly trained and certified so that a positive alert from Cuba provides probable cause to conclude that marijuana can be found in a motor vehicle. This involves consideration of a myriad

of issues, some of which are summarized in Defendant's Memorandum of Law in support of his Motion to Suppress. Without the records which Defendant has requested through FOIA, and which are being requested herein, Mr. Nicely cannot form an opinion as to whether the training and certification of Cuba meets professional standards, such that a positive alert provides probable cause to conclude that marijuana can be found in a motor vehicle. Therefore, discovery of the records requested is essential in order to Defendant to determine if he needs to present Mr. Nicely's testimony to the Court during the evidentiary hearing he has requested in connection with his Motion to Suppress.

Therefore, the requested discovery should be granted.

(2) Discovery of Police Disciplinary Records of the Arresting, Transporting and Booking Officers.

Defendant requests discovery be provided of the following information concerning the officers who arrested, transported, and booked him, as follows:

4. Copies of any documents of the Dearborn Police Department showing any findings of misconduct and/or any discipline ever imposed by the Dearborn Police Department, for any reason whatsoever, with respect to any of the officers involved in the arrest, transportation, and booking of Defendant on April 10, 2008, including the following police officers: _____ _____.

In this case, Defendant contends, among other things, that he is being prosecuted based on police misconduct. Therefore, the Defendant is requesting information regarding past complaints against the same Officers accusing them of misconduct of a similar nature, together with the records of the investigations of such complaints, and records of the results of such investigations. The defendant seeks to determine whether these officers have demonstrated a pattern or practice of abusing the rights of civilians. Such evidence, if discovered, would be admissible as evidence of

similar acts of misconduct, MRE 404(b), or of habit, MRE 406.

The Michigan Court of Appeals in People v Walton, 71 Mich App 478, 480-81, 484-86 (1976) squarely held that the records of internal police investigations into complaining witness police officers are discoverable when they are potentially material to the preparation of the defense case. Here, the Defendant contends in part that he is being prosecuted based on police misconduct. Under these circumstances, the discovery sought is relevant and material, and should be provided

Further, the Brady doctrine has been specifically expanded by the U.S. Supreme Court to provide that the government has an obligation to disclose information that might be used to impeach its witnesses. In United States v Bagley, supra, the Court stated:

> In the present case, the prosecutor failed to disclose evidence that the defense might have used to impeach Government's witnesses by showing bias or interest. Impeachment evidence, however, as well as exculpatory evidence, falls within the Brady rule....Such evidence is "evidence favorable to an accused," ... so that if disclosed and used effectively, it may make the difference between conviction and acquittal. 473 U.S. at 676, 105 S CT at 3380, 87 LEd2d at 490 (citations omitted).

The importance of Defendant's request for impeachment evidence cannot be overemphasized. The Supreme Court explained the rationale behind requiring Government disclosure of information bearing upon the credibility of its witnesses as well as matters more directly material of guilt or innocence in Napue v Illinois, 360 US 264, 269, 79 S Ct 1173, 3 LEd2d 1217 (1959):

> The jury's estimate of the truthfulness and reliability of a given witness may be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.

In Kyles v Whitley, 115 S.Ct. 1555 (1995), the Court emphasized the responsibilities of the prosecutor to disclose possible exculpatory evidence, and also made it clear that the Court will not

raise the threshold of the materiality standard based on the possible difficulty a prosecutor might have in identifying what evidence may become important at trial.

Defendant recognizes that there is a governmental and personal interest in the confidentiality of the personnel records in question. Therefore, the Defendant-Appellant suggests that this Court follow the procedure set forth in People v Stanaway 446 Mich 643, 678-684 (1994), cert. den. 513 U.S. 1121 (1995). This Court should order the production of the personnel records of _____for an *in camera* inspection. If this inspection discloses information that is arguably admissible on behalf of the Defendant, then this Court should Order disclosure of the relevant records to Defendant, with appropriate safeguards, as provided by Stanaway, supra.

For these reasons, the disclosure requested herein is required by the doctrine of Brady v Maryland, and progeny, and by the common law of Michigan, specifically In Re Bay Prosecutor, supra, aNd City of Harbor Springs, supra, and should be granted.

(3) Discovery of records of the Breath Alcohol Test which was administered to Mr. Robinson.

Defendant requests discovery be provided of the following information relating to the breath alcohol test which was administered to him:

> (4) The names of the officers who were present when Defendant was administered a breath alcohol test in connection with this matter.
>
> (5) Copies of any written reports or memoranda whatsoever which in any way refer to the breath alcohol test which Defendantwas given in connection with this case.

The video which was provided of the Police Department booking area clearly shows Defendant being administered a breath alcohol test. The video shows Defendant in the company of two Dearborn police officers, one Caucasian and one African American. One of the officers

gives Defendant an object, which he places up to his mouth. One of the officers told him he was breathing into a "breathalyzer." Defendant does not know what type of device it was. But one of the officers looked at the device, and said that Defendant was not drunk.

The identify of the officers who administered this test and the results are clearly relevant exculpatory evidence, in light of the statements in the police reports that Defendant appeared to be under the influence of alcohol. Defendant is seeking the identify of the officers who administered this test, as well as any Police Department documentation of this procedure, which is shown on the video. Defendant intends to subpoena these officers both for the Evidentiary Hearing to be held this matter, and for trial.

Therefore, the requested discovery should be granted.

IV. CONCLUSION

This Court has full authority to order the requested discovery, and should do so.

WHEREFORE, Defendant requests that his Motion for Discovery be granted.

Respectfully submitted,

REPLY MEMORANDUM IN SUPPORT OF MOTION FOR DISCOVERY

The Response Brief filed by the City (City's Response, at 15-17) repeatedly argues that since MCR 6.201 does not apply to misdemeanor criminal prosecutions, this must mean there is no discovery in misdemeanor criminal prosecutions. But no case from the Michigan Supreme Court or the Court of Appeals has ever said this, and, as argued herein, this conclusion does not follow logically from the premise.

The City also argues that the scope of discovery in misdemeanor criminal prosecutions is limited to the information which can be obtained pursuant to the FOIA. The City cites no legal

support for this novel proposition. In fact, the FOIA was never intended to be a discovery device in misdemeanor criminal cases. The legislature drafted the FOIA as a tool to keep the general public informed about the workings of government, not as a litigation discovery vehicle.

Nevertheless, in an effort to be cooperative, Defendant filed a request pursuant to the FOIA for the information he needs to prepare for the pretrial evidentiary hearings and for the trial in this case. The City acknowledges that it has refused to turn over voluminous records which the defendant requested pursuant to the FOIA based upon claims that the requested information is exempt from production pursuant to the FOIA. The City then faults the defendant for not having appealed to the Circuit Court its refusal to disclose the requested information. But since the FOIA was not designed to be a litigation discovery device, there is no particular reason to believe that the Circuit Court would have overruled the decision of the City and ordered the disclosure of the information which the City has refused to disclose.

There are exemptions in the FOIA which clearly allow government bodies to withhold information which is discoverable in some misdemeanor criminal prosecutions (for example, investigative records compiled for law enforcement purposes information, and the personnel records of law enforcement agencies, are generally exempted from disclosure through the FOIA; see MCL 15.243(1)(b) and (1)(s)(ix)). However, the City would fault the defendant for not appealing this issue to the Circuit Court, which would have resulted in an expenditure of costs and attorney time in the Circuit Court in a search for information to use at trial in this case, which information the Circuit Court may well decide is exempt from production pursuant to the FOIA. Instead, Defendant sought to properly address this issue by addressing his request for discovery in the proper forum, which is this Court.

For example, the City's has taken the position that the information sought from the police

personal records may is exempt from production pursuant to FOIA. But the scope of information which is available pursuant to the FOIA does not limit the scope of information which is required to be disclosed by the prosecution in misdemeanor criminal prosecutions. Whether Defendant is entitled to this information as a matter of criminal discovery is a totally separate issue from whether or not the City is correct in its position that the information sought is exempt under FOIA.

The City's Response takes the position that "as a general rule, discovery is not permitted in criminal cases, except as provided by court rule." (City's Response, at 15).. Importantly, the City provides no citation to any legal authority which supports this erroneous statement.

The Michigan Code of Criminal Procedure was enacted on October 1, 1989. However, at that time, no rule regarding discovery was enacted. The Michigan Supreme Court chose to permit the law of discovery in criminal cases to develop pursuant to case law. Then, on January 1, 1995, the Michigan Supreme Court enacted MCR 6.201. If the above quoted statement by the City is accurate, then there was no discovery in any criminal cases, felony or misdemeanor, between the years 1989 and 1995. But this was not the case. The cases cited in Defendant's opening Brief established both substantive and procedural law regarding discovery in criminal cases.

From 1995 until 1999, it was unclear whether or not MCR 6.201 applied to discovery in both felony and misdemeanor prosecutions. In 1999, the Michigan Supreme Court issued Administrative Order No. 1999-3, which stated that MCR 6.201 "applies only to criminal felony cases." However, the Michigan Supreme Court did not say and has never said that this means that there is no discovery in misdemeanor criminal prosecutions. As pointed out in Defendant's opening Brief, there is substantial precedent in this state establishing a broad right to discovery in misdemeanor criminal cases. The City does not cite any case law that stands for the contrary proposition. The Michigan Supreme Court has never said that the District Courts should simply

ignore decades of well-established case-law when deciding issues of discovery in misdemeanor criminal cases.

The primary case the City relies on is People v Greenfield, 271 Mich App 442, 448 (2006). But this case is not on point, because it is a felony case. As indicated above, discovery in felony cases is now subject to MCR 6.201, and is now governed by that rule. But there is presently no Court Rule which governs discovery in misdemeanor criminal cases, so therefore discovery is permitted to proceed based upon constitutional provisions, case precedent and the common law. Greenfield and the other cases cited by the City are all felony prosecutions, and therefore the analysis and holdings of these cases is completely inapplicable to the instant case.

But even pursuant to the Greenfield , discovery should be provided based upon a showing of "good cause." Defendant has clearly shown good cause in this particular case. With respect to one of Defendant's specific requests for discovery, the City has conceded the issue of good cause. The City acknowledges that evidence of a tracking dog's training and current certification is relevant and admissible to demonstrate the reliability, or lack of reliability, of a narcotics detection dog, pursuant to People v Clark, 220 Mich App 240 (1996) (City's Response, at 11-12). In fact, after refusing to provide Defendant with records of the dog's training and current certification pursuant to the FOIA, the City's Response, at 11-12 now represents that it will provide this Court with records which will provide the evidence of the dog's reliability "in accordance with established legal standards." However, the City has not yet provided Defendant with the records which are relevant to the issue of the reliability of the tracking dog, even though Defendant requested these records pursuant to the FOIA many months ago, and even though Defendant has retained an expert in the area of the training and certification of police service dogs, who is waiting to review the requested records.

Defendant also has shown good cause for production of the results of the breath alcohol test which he was given when he was in Dearborn Police custody. (It should be noted that the City has yet to even concede that such a test was administered, or identify the officers who administered it). The City's Response repeats the unsubstantiated, unsworn, and self-serving statements from the police reports that Defendant was behaving in a belligerent and unruly manner. The City obviously intends to offer police testimony along these lines against Defendant at trial, to lead the jury to believe Defendant was drunk and disorderly. Further, the City acknowledges that the police report in this case claims that the arresting officers smelled the "odor of intoxicants coming from [Defendant's] mouth area." (City's Response, at 17-18).

Obviously, the officers at the police station administered the breath alcohol test to Defendant in order to seek to discover evidence that he was drunk. When the results showed that Defendant was not intoxicated, the officers apparently destroyed any records that this test was administered, in order to prevent Defendant from being able to defend himself at trial with evidence that he was not intoxicated. The city effectively claims a right on behalf of the police to seek inculpatory evidence to use against Defendant, and, if the search for inculpatory evidence is unsuccessful, claims a right to destroy all records of the evidence and pretend that it never existed.

An analogous situation would be presented if Defendant was the suspect in a handgun-firearm homicide, and a police evidence technician administered a gunpowder residue test to his hands shortly after the shooting to see if he had recently fired a handgun. Based on the position of the City of Dearborn in this case, if the results of the gunpowder residue test were negative, the police would be permitted to destroy all records of the gunpowder test and pretend that it was never administered. Here, the City plans to offer evidence at trial concerning Defendant alleged drunk and disorderly behavior, and the alleged odor of alcohol on his breath, and prevent him from

defending himself with the evidence that he took a breath alcohol test and passed it. The city seeks to prevent Defendant from presenting accurate, scientific evidence that in fact Defendant was not intoxicated at the time of this incident, and that therefore the police claim to have been able to smell intoxicants on his breath is an unwarranted embellishment.

With respect to Defendant's request for discovery of records of prior disciplinary action taken against any of the arresting and investigating officers, Defendant contends that the imposition of discipline upon these officers for previous acts of misconduct may well be relevant and admissible at trial as evidence of similar acts of misconduct, MRE 404(b), or of habit, MRE 406. This is supported by the authorities cited in Defendant's opening Brief. If the City is concerned about the confidentiality of these records, then the appropriate procedure is for this Court to review the records *In Camera,* and make a determination whether there is information which should be disclosed to the defense in order to protect Defendant's right to a fair trial, so that he can make a record of his contention with respect to the admissibility of the evidence of the prior misconduct.

Further, the City disingenuously seeks to discredit the precedential affect of People v Walton, 71 Mich App 478 (1976), by pointing out that this is a pre-MCR 6.201 case. (City's Response at 17). But if, as the City claims, MCR 6.201 does not apply to misdemeanor criminal prosecutions, then the fact that Walton is a pre-MCR 6.201 case is completely irrelevant. Walton is a published Opinion of the Michigan Court of Appeals which is of precedential value and it remains applicable in misdemeanor prosecutions because the Michigan Supreme Court is allowing the law of discovery in misdemeanor cases to develop based upon the constitutions, case law, and the common law, instead of pursuant to MCR 6.201. The rule established in Walton supports Defendant's request for discovery in this case, and ought to be followed.

Respectfully submitted,

STATE OF MICHIGAN

IN THE 52-3rd DISTRICT COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff.

vs.

BRIAN BLLYEA,

Defendant.
_____/

KIRSTEN NIELSEN HARTIG (P45155)
Attorney for Defendant
7 West Square Lake Road
Bloomfield Hills, MI 48302
(248) 828-8480
_____/

DEMAND FOR DISCOVERY

NOW COMES Defendant, Brian Bllyea, by and through his attorney, Kirsten Nielsen Hartig, and demands that the prosecuting authority in this action produce all documents and other evidence surrounding the stop, investigation, arrest, and post-arrest activity pertaining to this incident.

This request is made for purposes of preparing for pretrial and trial and is made in the interest of justice and pursuant to applicable court rule, case law, statute, and administrative rule, and if not provided it will be presumed that there will be no attempt to admit the unprovided items into evidence. It should be understood that this demand for discovery is continuing.

Defendant is requesting disclosure, preservation, and production of all the following items, with the understanding that any costs for reproduction will be borne by the Defendant:

1. Police reports.
2. Alcohol influence reports.
3. Accident reports.
4. Any videotapes or audio recordings made of the stop, investigation, arrest, and post-arrest activity including the booking procedure, advice of rights, and chemical testing.
5. Witness statements.
6. Notes made by police officers that are to be utilized at trial, including notes o the back of any ticket.

7. Notice to secretary of State of Officer's Report of Refusal, if applicable.
8. Copy of actual sworn complaint.
9. Names and addresses of all lay and expert witnesses.
10. Names of any witnesses who observed Defendant perform any field sobriety tests.
11. Names of any witnesses who heard any statements or admissions made by Defendant of an inculpatory or exculpatory nature.
12. Copies of any written statements made by the Defendant.
13. The substance of any verbal statements made by the Defendant which the prosecution intends to produce at trial and/or which tend to exculpate Defendant.
14. Results of any chemical tests of defendant's blood alcohol content, including any documentation which was used in conduction the test.
15. Preservation of any blood or urine samples taken from Defendant so that same may be analyzed by experts for the defense.
16. If any evidential breath alcohol test was administered, the following is requested:

    a. The name of the evidential breath alcohol test operator;
    b. The date of the operator's original certification and most recent recertification; as required by Administrative Rule 325.2656;
    c. The location of the evidential breath alcohol test instrument;
    d. The type of the evidential breath alcohol test instrument;
    e. The name of the person or persons who observed the Defendant fifteen minutes prior to the administration of the evidential breath alcohol test;
    f. Dates on which any simulator tests were performed on the evidential breath test instrument from midnight of the Saturday preceding Defendant's test to midnight of the Saturday following Defendant's test; as required by Administrative Rule 325.2653(1).
    g. Dates on which the evidential breath alcohol test instrument was inspected and certified as provided by Administrative Rule 325.2653.
    h. Information pertaining to exactly what rights Defendant was advised of prior to having a chemical test administered, who read them, and a copy of any rights form" if available:
    i. Information about whether the Defendant requested to make a telephone call at any time before or after the administration of any breath test;
    j. Information regarding any requests made by Defendant for chemical tests other than that which was offered and/or administered by the police.

17. The names of any persons in contact or in a position to observe the Defendant within one hour after his/her arrest.
18. Any other information not specifically enumerated which the prosecution intends to produce at trial or an inculpatory nature.
19. Disclosure of any exculpatory evidence that may negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

HARTIG LAW FIRM

By: _____
Kirsten Nielsen Hartig (P45155)
Attorney for Defendant

HIPAA PRIVACY AUTHORIZATION
For Disclosure of Protected Health Information

Patient Name:

Patient Address:

Date of Birth:

Social Security Number:

1. I make this authorization for the purpose of copying records in connection with a lawsuit or claim to which I am a party.

2. This authorization is directed to and applies to protected health information maintained by:

3. I hereby authorize the above, its director, administrative and clinical staff or assignees, medical information services and billing departments to release any and all medical records and information from my date of birth to the present unless specified otherwise, relating to my care and treatment including x-rays, photographs, electronic and digital files and any other records, unless I expressly direct to specify otherwise. I understand that medical information may include records, if any, relating to treatment for alcohol and drug abuse protected under the regulations in 42 C.F.R. Part 2; psychiatric/psychological services and social work records protected under the regulations in 45 C.F.R. Part 164 and specifically this authorization is for the release of protected health information as described in 45 C.F.R. 164.508 and 45 C.F.R. 164.512; and any information regarding communicable diseases and infections, defined by Michigan Department of Public Health rule, which can include tuberculosis, venereal diseases, sexually transmitted diseases, acquired immunodeficiency syndrome (AIDS), human immunodeficiency virus (HIV) or ARC.

4. **This information is to be released for copying purposes to: Thomas M. Loeb, Esq., 32000 Northwestern Hwy., Ste. 170, Farmington Hills, MI 48334-1507, telephone: (248) 851-2020.**

5. I understand that information used or disclosed pursuant to this authorization may be disclosed by the recipient and may no longer be protected by the Federal Privacy Rules.

6. A photocopy of this authorization shall serve in its stead. Once information is disclosed, no further information can be disclosed pursuant to this authorization.

7. I understand that I have the right to revoke this authorization at any time. I understand that if I revoke this authorization I must do so in writing and send it to the hospital, doctor or other custodian of medical information. I understand that the revocation will not apply to information that has already been released in response to this authorization.

8. I understand that authorizing the release of this health information is voluntary and that I need not sign this form in order to ensure health care treatment, eligibility for benefits, payment or health plan enrollment.

Subscribed and sworn to before me
this_____day of _____,20___

_____
Signature of Patient

_____
Notary Public, _____County, MI
My commission expires:

Dated:

LAW ENFORCEMENT TELEPHONE INVESTIGATIONS RESOURCE GUIDE

– Cellular, Satellite & VoIP Phone Providers

STEP 1 - Determine the target phone service provider:

- **NeuStar**
  (NPAC) **Number Portability Administration Center** http://www.npac.com/lawenforcement/registration.shtml

  CODE# XXXXXXXXXX *- obtain your own PIN from NeuStar by registering at the link listed above*
  Automated Number **(571) 434-5781** NeuStar HELP Line (571) 434-5395

NOTE: If you query a number through NeuStar and it has "NOT BEEN PORTED", check it through Fone Finder to determine the likely service provider.

- **Fone Finder** http://www.fonefinder.net/

TIP: ***To identify providers for " 800" numbers, call (888) 767- 3300 Option 1***

STEP 2 – Determine if the case involves - "Exigent Circumstances" (e.g. Abduction, Missing Person at risk or Dangerous Fugitive)

If so, using the provider resource list, contact the provider and tell them: *"We are investigating a case that we believe is an emergency involving immediate danger of death or serious bodily injury".* Do not explain the situation in detail - as they only need to have a *reasonable belief* that the situation involves immediate danger of death or serious injury. The provider will typically verify your information and then send you their Exigent Circumstance Request form via fax. A few providers require you to send your request via fax on official letterhead. Complete the form or the letter and fax it back. Some providers will require a valid Court Order to be submitted within 48 hours of the Exigent Circumstance Request.

TIP: ***If the target phone is roaming on another provider's network – complete the Exigent Circumstances process with the roaming provider to get the best and fastest results for call records and tower locations.***

STEP 3 – Determine needed records & legal process required:

NOTE: Before submitting Subpoenas, Court Orders or Search Warrants, it is a good idea to contact the provider identified through the steps listed above and confirm that they are indeed the provider for the account. It is also recommended that you verify the provider's legal compliance process and contact information to avoid any delays or confusion.

- **PRESERVATION LETTER:** A preservation letter [USC 2703(b) (2)] should be sent to the provider via fax as soon as possible to preserve records before they are discarded and cannot be recovered. This is particularly an issue with text message and voice mail content which are generally only retained for 72 hours. *A sample preservation letter is included on the last page of this guide.*
- **SUBPOENA:** For basic transactional records (e.g. Subscriber account details, Billing Records or Account Notes) only a Subpoena is required. Submit the Subpoena via fax to the provider's Subpoena Compliance fax number. **Call the provider to verify receipt!**
- **COURT ORDER:** For detailed records (e.g. In-coming & Out-going Call Detail, Cell Tower Locations – including location "pings", Text Message content, Voice Mail content and PEN Registers) a Court Order (or Search Warrant) is required. Submit the Court Order (or Search Warrant) via fax to the provider's Legal Compliance fax number. It is also a good idea to include a cover letter that includes your contact information, the target number and the specific records you are requesting and specify that you would like the records returned in an electronic format (e.g. Excel). **Call the provider to verify receipt!**

AT&T Mobility (Cingular) National Subpoena Compliance Center P.O. Box 24679 West Palm Beach, FL 33416 (800) 635-6840 Main (888) 938-4715 Fax Physical Address: 11760 US Highway 1, North Palm Beach, FL 33408	GSM	MVNO prepaid service as **GoPhone** **Send a Text Message:** AT&T Mobility [10-digit phone number]@txt.att.net Example: 2125551212@txt.att.net AT&T optional GPS location service: **Family Map** https://familymap.wireless.att.com/finder-att-family/welcome.htm
Cricket Communications Subpoena Compliance 10307 Pacific Center Court San Diego, CA 92121 (858) 882-9301 Main (858) 882-9237 Fax	CDMA	Roaming partner with MetroPCS
EMBARQ Law Enforcement Support 5454 W. 110th Street MS: KSOPKJ0402 Overland Park, KS 66211 (877) 451-1980 Main (913) 254-5800 Fax	CDMA	Embarq is the land-line division of **Sprint / Nextel**.
OnStar ATTN: Records Request P.O. Box 430627 Pontiac, MI 48343 (888) 466-7827 or (248) 577-7465	CDMA	**OnStar** will need the registered user name, **OnStar** phone number or VIN. **OnStar** has an Emergency shut-down feature **OnStar** is an MVNO partner with **Verizon**
MetroPCS Subpoena Compliance 8144 Walnut Hill Lane Dallas, TX 75231 (800) 571-1265 Main (972) 860-2635 Fax	CDMA	**Send a Text Message:** MetroPCS [10-digit phone number]@metropcs.com Example: 2125551212@metropcs.com

Qwest Communications Subpoena Compliance 1005 17th Street, Suite 120 Denver, CO 80202 (303) 896-2522 Main (303) 896-4474 Fax	**CDMA**	Qwest offers cellular service through a partnership with **Verizon**. Qwest® One Number Service - a single phone number for a Verizon Wireless phone and Qwest landline phone. Calls will ring both the Qwest landline phone and the Verizon Wireless phone. Unanswered calls to a single voice mail box. In some cases it may be necessary to send a Subpoena or Court Order to both Qwest & Verizon.
Sprint / Nextel Communications Security & Subpoena Compliance 6480 Sprint Parkway MS: KSOPHM0216 Overland Park, KS 66251 (800) 877-7330 Main (Option 1) (816) 600-3111 Subpoena Compliance Group Immediate Response Requests (not Emergencies) (913) 315-8774 Fax (816) 600-3121 Trials/Appearance CSTrialTeam@sprint.com	**CDMA**	**Virgin Mobile** MVNO prepaid service – Sprint **Send a Text Message:** Virgin Mobile USA [10-digit phone number]@vmobl.com Example: 5551234567@vmobl.com **Boost Mobile** MVNO prepaid service – Nextel (iDEN) PTT service or CDMA service **Send a Text Message:** Boost Mobile [10-digit phone number]@myboostmobile.com Example: 2125551212@myboostmobile.com **Kajeet** & **iWireless** – MVNO prepaid service – Sprint Sprint offers an optional GPS location service: **Family Locator** http://www.nextel.com/en/services/gps/family_locator.shtml
T-Mobile, USA Law Enforcement Relations 4 Sylvan Parsippany, NJ 07054 (973) 292-8911 Main (973) 292-8697 Fax ler2@t-mobile.com	**GSM**	**Send a Text Message:** T-Mobile [10-digit phone number]@tmomail.net Example: 4251234567@tmomail.net
TracFone Wireless, Inc. Subpoena Compliance 9700 NW 112th Avenue Miami, FL 33178 (800) 820-8632 Main (305) 715-6932 Fax	**MVNO** **GSM or CDMA options**	Also sold as **Net10** & **SafeLink** in some markets (800) 867-7183 Customer Care Center

LAW ENFORCEMENT TELEPHONE INVESTIGATIONS RESOURCE GUIDE
– Cellular, Satellite & VoIP Phone Providers

U.S. Cellular Subpoena Compliance Department One Pierce Place, Suite 800 Itasca, IL 60143 (630) 875-8270 Main (866) 669-0894 Fax (865) 777-8333 after Hours	CDMA	**Send a Text Message:** US Cellular [10-digit phone number]@email.uscc.net Example: 4251234567@email.uscc.net Roaming partner with **Verizon**
Cellco Partnership dba Verizon Wireless Custodian of Records 180 Washington Valley Rd. Bedminster, NJ 07921 (800) 451-5242 Main (888) 667-0028 Fax (Subpoenas) (908) 306-7501 **Exigent Fax** (908) 306-7491 Fax (Court Orders / Search Warrants)	CDMA	**INpulse** is Verizon prepaid service **Alltel** – is also a Verizon company **AirTouch** – is also a Verizon company **JitterBug** – is also a Verizon company **Send a Text Message:** Verizon [10-digit phone number]@vtext.com Example: 5552223333@vtext.com Verizon offers an optional GPS location plan: **Family Locator** http://products.verizonwireless.com/index.aspx?id=fnd_familylocator
Globalstar Subpoena Compliance 461 S. Milpitas Blvd. Milpitas, CA 95035 (408) 933-4840 Main (408) 933-4844 Fax (877) 452-5782 Customer Care	Satellite	Satellite Telephone Service Only Law Enforcement Technical Support: (408) 933-4144 Jose Jara (Office) (408) 828-0987 Jose Jara (Cell phone)
Iridium Satellite ATTN: Orders LEA 8440 S. River Parkway Tempe, AZ 85284 USA (480) 752-1144 Main (480) 752-5130 Fax (866) 947-4348 Customer Care	Satellite	Satellite Telephone Service Only Law Enforcement Technical Support: (602) 741-4224 Thomas Lopez (Cell phone) (877) 454-7631 Thomas Lopez (Pager)
There are numerous VoIP providers – several currently popular VoIP providers are listed below:	VoIP	Additional VoIP providers can be found here: http://www.myvoipprovider.com/Top_100_VoIP_Providers

Magic Jack http://www.magicjack.com/ YMax Communications ATTN: Lorraine Fancher 5700 Georgia Avenue West Palm Beach FL 33405 (561) 586-3380 Legal Compliance (888) 762-2120 Fax Lorraine.Fancher@ymaxcorp.com 	**VoIP**	The Magic Jack resembles the appearance of a flash drive. You can simply plug it into a USB port of your computer and then plug in any kind of analog or cordless phone on the other end and you would be able to make unlimited local and long distance calls. Features include voice mail, call forwarding, conference calling, call waiting and caller ID.
Vonage http://www.vonage.com/ Hours of Operation: 24/7 Phone: 1-866-293-5674 Please state immediately that you are from a LEA with an emergency threat to life situation. **Non-Emergency** Email: SubpoenaProcessTeam@Vonage.com Phone: 732-231-6705 Fax: 732-202-5221 Vonage Holdings Corp. Attention: Legal Affairs Administrator - Legal Dept, 23 Main Street Holmdel, NJ 07733	**VoIP**	You can verify a phone number is a Vonage phone number by calling (732)377-3597. You must add a "1" before the number including the area code and the system will tell you if the number is a Vonage number or not. Emergency (life-threatening situation) Requests must be followed by the proper legal demand within 48 hours. We will verbally provide the information, and once we have received the proper legal demand, we will follow-up with a hard copy. Hours of Operation: 8:30 AM to 5:30 PM (Monday – Friday – ET) Response time for valid subpoena requests: 3-5 days Vonage requires special hardware in order to work - usually an Ethernet router with built-in telephone adapter. Once you sign up for a Vonage account, you can use a Web interface to view your call history and change your account settings.
Skype http://www.skype.com/ Skype Communications S.A.R.L 22/24 Boulevard Royal, L-2449 Luxemburg Tel: 01135226190920 lerm@skype.net	**VoIP**	The Skype application looks and works a lot like an instant messaging (IM) client. As with an IM client, users can change their on-line status, look at their contact list and decide who they want to talk to. In order to use these functions and to make calls, their computer has to be on and connected to the Internet, and their Skype application has to be running. Calls to other Skype users are free. Skype Mobile application can be used with **Verizon** smart phones with an active data plan. These calls use Verizon's 3G broadband connection.

LEGAL FRAMEWORK:

United States Constitution 4th Amendment

Protects citizens against "unreasonable searches and seizures" by the Government.

Hierarchy of Protection

1. Transactional Records (name, number, billing records, etc.)
2. Numbers dialed from or to a phone.
3. Location information.
4. Content of stored communication (e-mail, voice mail, text messages, etc).
5. Content of telephone conversations (wiretap).

18 U.S.C. §§ 2701-2711 — STORED WIRE AND ELECTRONIC COMMUNICATIONS & TRANSACTIONAL RECORDS ACCESS

- **Section 2701**: It is a crime to intentionally access electronic communication without authorization.
- **Section 2702**: A provider of electronic communications may not disclose customer records to the government except as authorized by Section 2703, or if the provider reasonably believes an emergency involving immediate danger of death or serious bodily injury justifies disclosure. Penalties include fines, civil liability and imprisonment for 1 to 10 years.
- **Section 2703(b) (2).** A governmental entity may include in its subpoena or court order a requirement that the service provider to whom the request is directed create a backup copy of the contents of the electronic communications sought in order to preserve those communications. Without notifying the subscriber or customer of such subpoena or court order, such service provider shall create such backup copy as soon as practicable consistent with its regular business practices and shall confirm to the governmental entity that such backup copy has been made. Such backup copy shall be created within two business days after receipt by the service provider of the subpoena or court order.
- **Section 2703(c)**: A court order, search warrant or customer consent is required for the release of records of electronic communications (including location information). A subpoena can be used to obtain transactional records, but not for location information.
- **Section 2703(d)**. A court order for disclosure under subsection (b) or (c) may be issued by any court that is a court of competent jurisdiction and shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation.

Refer to the complete United States Code sections for details: http://www.justice.gov/criminal/cybercrime/ECPA2701_2712.htm

WEBSITE RESOURCES FOR PHONE RELATED INVESTIGATIONS:

Ask CALEA

Communications for Law Enforcement Act (CALEA). CALEA directs the telecommunications industry to design, develop, and deploy solutions that meet certain assistance capability requirements. As a law enforcement user you can create a free account and access CALEA's resources. Resources include provider contact information, cell tower location details, sample forms, etc.
https://sw.askcalea.net/

Find Cell Phone Providers for a particular region by Zip Code

Find and research all the cell phone companies licensed to serve your area. Enter your ZIP code to start your search.
http://www.wirelessadvisor.com/

Understanding Cell Phone Providers – Cnet

A comprehensive source of information with details about each of the major providers.
http://reviews.cnet.com/2719-3504_7-389-1.html?tag=page;page

http://www.spoofcard.com/
LE Contact: cmazur@teltechcorp.com (732) 838-1909

Locate Cell Towers

Find cell towers and the associated providers in a given area. Helpful when the location and time frame have been narrowed down, but the target's phone number is unknown. A Court Order for a "tower Dump" could provide valuable leads.
http://www.cellreception.com/towers/

Glossary of Cellular Phone Terms

A comprehensive list of terminology associated with cellular telephone related technology.
http://www.wirelessadvisor.com/resources/glossary

Phone Scoop

A resource with instructions to help navigate through various menus on a particular cell phone model to access address books, recent call history, features, options, accessories, etc.
http://www.phonescoop.com/

Internet Service Providers (ISP) Law Enforcement Contact Information

This confi dential law enforcement site includes current contact information for ISPs and similar information services, specifically, contacts at the legal departments for law enforcement service of subpoena, court orders, and search warrants.
http://www.search.org/programs/hightech/isp/ **How to trace an IP address:** http://www.wikihow.com/Trace-an-IP-Address

Bank Card Services - 24 Hour Law Enforcement Contact Information

Phone equipment and services are usually paid for with credit or debit cards. The transactional records from these purchases can be very helpful in identifying purchasers and their associates, retail locations (a possible source of surveillance video) and other relevant purchases that may help develop leads in an investigation (e.g. Internet service providers, "Spoof" card purchases, gas stations used, etc.).

Visa	Accounts begin with "4"	1-800-FOR-VISA (367-8472)
American Express	Accounts begin with "37"	1-800-528-2121
Diner's Club	Accounts begin with "38"	1-800-525-9040
Discover	Accounts begin with "6"	1-800-347-3723
Master Card	Accounts begin with "5"	1-800-231-1750

Bank Identification Number Database: http://www.binbase.com/csv.php?module=search

Bank Identification Numbers Database

GLOSSARY OF TERMS:

CDMA - Code Division Multiple Access

CDMA and GSM are the names of competing cellular phone standards. CDMA phones are activated remotely, by the carrier, using the phone's serial number, known as the ESN. Since each carrier has a database of all the ESNs that are approved for its network, this lets most CDMA carriers refuse to activate phones not originally intended for their network. CDMA phone providers include Verizon, Sprint, US Cellular, MetroPCS and Cricket.

GSM - Global System for Mobile communications

GSM phones are associated with what's called a SIM card, or Subscriber Identity Module. This card, about the size of a fingertip and the thickness of a piece of paperboard, carries an encrypted version of all the information needed to identify the wireless account to the network. On most GSM phones the SIM card is usually under the battery. GSM phone providers include AT&T Mobility (including GoPhone) and T-Mobile. Unlike CDMA phones, GSM phones can be used internationally.

iDEN - Intergraded Digital Enhanced Network (Includes Push-to-Talk "PTT" walkie-talkie feature)

A wireless technology from Motorola combining the capabilities of a digital cellular telephone, two-way radio, alphanumeric pager and data/fax modem in a single network. Nextel is the brand name for Sprint's line of iDEN walkie-talkie enabled phones – this feature is called "Direct Connect". Boost Mobile is a subsidiary of Sprint Nextel, providing an economy prepaid service (MVNO) for the youth market, using the same iDEN technology as Nextel, and using Sprint Nextel's iDEN network. Boost also offers unlimited service using CDMA phones and Sprint Nextel's CDMA network.

MVNO - Mobile Virtual Network Operator - Secondary seller

An MVNO is a cell phone carrier (such as a prepaid wireless carrier) that typically does not have its own network infrastructure and licensed radio spectrum. Instead, a smaller MVNO has a business relationship with a larger *mobile network operator* (MNO). An MVNO pays wholesale fees for minutes and then sells the minutes at retail prices under its own brand. An MVNO, therefore, is an MNO reseller. An MVNO is actually a customer of an MNO rather than a competitor. An MVNO can typically set its own pricing following agreed-upon rates with its contracted MNO. Boost Mobile, TracPhone, OnStar and JitterBug, for example, are all prepaid wireless MVNOs. AT&T Mobility and Verizon Wireless, for example, are MNOs. It is often beneficial to request records from the MNO verses the MVNO – especially with live tracking and cell tower records.

PCS – Personal Communications Service

Personal Communications Services (PCS) is a wireless phone service very similar to cellular phone service, but with an emphasis on *personal* service and extended mobility. The term "PCS" is often used in place of "digital cellular," but true PCS means that other services like paging, caller ID and e-mail are bundled into the service. While cellular was originally created for use in cars, PCS was designed from the ground up for greater user mobility. PCS has smaller cells and therefore requires a larger number of antennas to cover a geographic area. PCS phones use frequencies between 1.85 and 1.99 GHz (1850 MHz to 1990 MHz). Technically, cellular systems in the United States operate in the 824-MHz to 894-MHz frequency bands; PCS operates in the 1850-MHz to 1990-MHz bands.

SMS - Short Message Service – Text messages

SMS stands for **Short Message Service**. SMS is a method of communication that sends text between cell phones, or from a PC or handheld to a cell phone. The "short" part refers to the maximum size of the text messages: 160 characters (letters, numbers or symbols in the Latin alphabet). SMS is a store-and-forward service, meaning that when you send a text message to a target, the message does not go directly to your target's cell phone. The advantage of this method is that your target's cell phone doesn't have to be active or in range for you to send a message. The message is stored in the SMSC (for days if necessary) until your target turns their cell phone on or moves into range, at which point the message is delivered. The message will remain stored on your target's SIM card (GSM phones) until it is deleted.

SIM Card

GSM cellular phones require a small microchip, called a SIM card - Subscriber Identity Module, to function. Approximately the size of a small postage stamp, the SIM Card is usually placed underneath the battery in the rear of the unit, and (when properly activated) stores the phone's configuration data, and information about the phone itself, such as which calling plan the subscriber is using. When the subscriber removes the SIM Card, it can be re-inserted into another phone that is configured to accept the SIM card and used as normal. Each SIM Card is activated by use of a unique numerical identifier; once activated, the identifier is locked down and the card is permanently locked in to the activating network. For this reason, most retailers refuse to accept the return of activated SIM Cards. Common providers that require SIM cards include: AT&T Mobility, T-Mobile and Nextel.

IMEI - International Mobile Equipment Identifier

A unique 15-digit number that serves as the serial number of the GSM handset. The IMEI appears on the label located on the back of the phone. The IMEI is automatically transmitted by the phone when the network asks for it. A network operator might request the IMEI to determine if a device is in disrepair, stolen or to gather statistics on fraud or faults.

ESN - Electronic Serial Number

The unique identification number embedded in a wireless phone by the manufacturer. Each time a call is placed, the ESN is automatically transmitted to the base station so the wireless carrier's mobile switching office can check the call's validity. The ESN cannot easily be altered in the field. The ESN differs from the mobile identification number, which is the wireless carrier's identifier for a phone in the network. MINs and ESNs can be electronically checked to help prevent fraud.

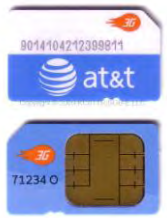
Cell Site

The location where the wireless antenna and network communications equipment is placed. A cell site consists of a transmitter/receiver, antenna tower, transmission radios and radio controllers. A cell site is operated by a Wireless Service Provider (WSP).

VoIP – Voice over Internet Protocol

VoIP (voice over IP) is an IP telephony term for a set of facilities used to manage the delivery of voice information over the Internet. VoIP involves sending voice information in digital form in discrete packets rather than by using the traditional circuit-committed protocols of the public switched telephone network. A major advantage of VoIP and Internet telephony is that it avoids the tolls charged by ordinary telephone service. Popular VoIP providers include Vonage, Skype and Magic Jack.

NOTE:



EXAMPLE OF A SIM CARD FROM A GSM PHONE

The information contained in this guide is law enforcement sensitive and should not be disseminated outside of the criminal justice system. Do not include with investigative reports.

Do not disclose this information in court anymore than is absolutely necessary to make your case.

Never disclose to the media these techniques – especially cell tower tracking. Simply state, "Through further investigation we were able to locate the suspect (or missing person)".

While every effort has been made to ensure the information contained in this guide is current and accurate, Fox Valley Technical College does not hold itself liable for any consequences, legal or otherwise, arising from the use of this Guide. Consult with your own agency and local prosecutor for legal advice before proceeding.

SAMPLE CELL PHONE RECORDS PRESERVATION LETTER:

(OFFICIAL DEPARTMENT LETTERHEAD)

IMPORTANT:

Always call the provider after the **Preservation Letter** has been sent to them via fax to confirm that it has been received and will be acted on in a timely manner.

March 10, 2010

National Subpoena Compliance Center
AT&T Mobility
P.O. Box 24679
West Palm Beach, Florida 33416-467
(800) 635-6840 FAX (888) 938-4715

DO NOT DISCLOSE

RE: Court Order to Provide Telephone Records JCSO Case 10-1234

URGENT REQUEST FOR ASSISTANCE - CHILD ABDUCTION INVESTIGATION

The Jackson County Sheriff's Office is investigating a child abduction. We will be requesting telephone records which we believe will provide important evidence in our case. The court order, which will follow, will comply with all requirements outlined in United States Code, Title 18, Part I, Chapter 121, **§** 2703(d). The order will be obtained with a sworn affidavit which will include "specific and articulable facts".

We are sending this notice to request the records be pulled and held before they are lost and cannot be recovered. The court order will follow within 30 days.

Please call me immediately if these records are no longer available or if there are any problems.

SUBSCRIBER TELEPHONE NUMBER: (541) 555-1212 **TIME PERIOD:** 02-15-10 to current

We will be requesting:

- **AT&T Mobility subscriber billing & account information – to include account notes.**
- **In-coming and out-going cell tower records.**
- **In-coming and out-going call detail records.**
- **Cell tower location information.**
- **All stored photographic or video images.**
- **All stored voice mail messages.**
- **In-coming and out-going text messages.**

Respectfully,

Detective Joe Friday

TOOLS FOR PLOTTING CELL TOWER LOCATION DATA:

Microsoft Streets & Trips – Free Trial Download (60 day)

http://www.microsoft.com/streets/en-us/Trial.aspx

Using Streets & Trips to Map Cell Towers:

1. Open Streets & Trips
2. Data Tab – select "Import Wizard"
3. Find the appropriate cell tower data file from the provider (Excel or .xls file)
4. Select the file
5. Click on Sheet 1
6. Review the dialog box and make sure the data is match to Latitude & Longitude
7. Click on Finish

Paraben Forensics Point 2 Point– Free Demo Download (Demo has some limitations over the full version – plots on Google Earth)

http://www.paraben.com/catalog/product_info.php?cPath=25&products_id=404

GPS data points can show up in investigations from devices as well as subpoenaed cell phone records. Point 2 Point converts these data points to be read directly into Google Earth so investigators can quickly and easily visualize where these GPS locations are. Paraben's Point 2 Point is a point analysis tool that allows you to import GPS location data from call detail record spreadsheets, Device Seizure, or other GPS data points and export them to PDF or KML format for use with Google Earth. Imagine being able to take raw data from cell phone providers such as call detail records or GPS devices for review in a visual map for easy analysis.

- Import and view data from Tower Location spreadsheets directly from the provider
- Import and view data in Google Earth Map Files (.kml)
- Export all imported data to either .kml files to be viewed with Google Earth or to .pdf files.

On-line Aerial Image Resources

Google Earth: http://earth.google.com/ Bing Maps: http://www.bing.com/maps/ (Select aerial view)

BRADY V. MARYLAND - SWORD OR SHIELD?

By Carol A. Brook, Executive Director,
Federal Defender Program for the Northern District of Illinois
2012

I. History of ***Brady v. Maryland***, 373 U.S. 83 (1963)

A. John Leo Brady and his "plans"

B. Represented by E. Clinton Bamberger, first director of Office of Economic Opportunity Legal Services Program

II. Explanation of *Brady*

A. Broader than necessary based on state prosecutor's deliberate decision to withhold evidence - Focuses on **fairness**, not guilt or innocence

B. Meaning of term "evidence" in *Brady* context

III. Prosecution's Response to Opinion

A. Second Circuit Meeting, Jon Newman hypothetical, *Discovery in Criminal Cases*, 44 F.R.D. 481 (1968).

B. "El Rukn" cases in Chicago - ***United States v. Boyd***, 55 F.3d 239 (7th Cir. 1995).

IV. Prosecution's Obligations

A. ***Banks v. Dretke***, 540 U.S. 668 (2004) - Open file capital case ("They could have found it"), Court holds *Brady* not a game of hide and seek.

B. Materiality

i. ***Smith v. Cain***, 132 S. Ct. 627 (2012) (In the second *Brady* case out of New Orleans in a year, Chief Justice Roberts definitively holds that the failure to disclose a detective's notes indicating that the main eyewitness had earlier said he could not identify the murderers required reversal; case emphasizes that "reasonable probability" does NOT mean that the defendant would likely have received a different verdict, only that "the likelihood of a different result is great enough to 'undermine[] confidence in the outcome'").

ii. Evidence is material if there is "a reasonable probability that, had the evidence been disclosed . . . , the result of the proceeding would have been different." ***Youngblood v. West Virginia***, 547 U.S. 867 (2006).

iii. Materiality is to be "considered collectively, not item by item." ***Kyles v. Whitley***, 514 U.S. 419, 436 (1995). Thus, the prosecution is charged with the duty to learn of all favorable evidence known to the prosecution team so it may decide what is material. *Id.* at 438. Note the difficulty with the backward view of how to determine materiality.

See also ***United States v. Pelullo***, 105 F.3d 117 (3d Cir. 1997)(*Brady* violation where cumulative effect of nondisclosure created verdict unworthy of confidence); ***United States v. Alfred Sanchez & Aaron DelValle***, 2009 U.S. Dist. LEXIS 119398 (N.D. Ill. Dec. 22, 2009) (After a lengthy trial where jury convicted the Commissioner of the Department of Streets and Sanitation and a co-defendant, the court threw out the verdict and ordered a new trial after learning that the prosecutors had failed to turn over exculpatory evidence in possession of the FBI, stating that he had "lost confidence in the integrity of the verdict").

iv. Context is critical. ***Ferrara v. United States***, 456 F.3d 278 (2d Cir. 2006) (serious prosecutorial improprieties require new trial, even in plea case, despite ***United States v. Ruiz***, 536 U.S. 622 (2002)).

C. Evidence need not be admissible

i. Partially admissible is fine.

ii. Leading to admissible evidence is fine. But case law confusing on what exactly is meant by "admissible." *See, e.g.*, ***United States v. Salem***, F.3d (7th Cir. 2009)(stating that only "admissible" evidence can be material, but going on to say that impeachment evidence is clearly material; holding in effect that whether the "evidence" is introduced or simply used at trial is irrelevant for the materiality analysis). *See also* ***United States v. Triumph Capital Group***, 544 F.3d 149 (2d Cir. 2008); ***United States v. Rodriguez***, 496 F.3d 221 (2d Cir. 2007).

See also ***United States v. Naegele***, 468 F. Supp. 2d 150, 153 (D.D.C. 2007) ("The government is obligated to disclose all evidence relating to guilt or punishment which might be reasonably considered favorable to the defendant's case, that is, all favorable evidence that is itself admissible or that is likely to lead to favorable evidence that would be admissible, or that could be used to impeach a prosecution witness."

See this statement from the U.S. Attorney's Manual: "While ordinarily, evidence that would not be admissible at trial need not be disclosed, this policy encourages prosecutors to err on the side of disclosure if admissibility is a close question." Sec. 9-5.001(B)(1)(2010).

iii. To be used on cross-examination to "discipline" a witness or impeach in some way is fine. *See* ***Ellsworth v. Warden***, 333 F.3d 1 (1st Cir. 2003); ***United States v. Triumph Capital Group***, 544 F.3d 149 (2d Cir. 2008); ***United States v. Rodriguez***, 496 F.3d 221 (2d Cir. 2007); ***United States v. Gil***, 297 F.3d 93 (2d Cir. 2002).

D. Partially exculpatory and partially inculpatory is *Brady*.

E. Failure to disclose the arrest of other suspects violates *Brady*. ***Banks v. Reynolds***, 54 F.3d 1509, 1517-18 (10th Cir. 1995).

F. Inconsistent witness statements are *Brady*. ***Leka v. Portuondo***, 257 F.3d 89 (2d Cir. 2001).

G. Negative exculpatory statements must be disclosed.

H. Exculpatory oral statements must be disclosed. ***United States v. Rodriguez***, 496 F.3d 221 (2d Cir. 2007).

I. Evidence must be disclosed in time to be used in a meaningful way. ***United States v. McDuffie***, 2009 U.S. Dist. LEXIS 75737 (E.D. Wash. Aug. 13, 2009) (Where federal prosecutors failed to disclose key fingerprint evidence until after direct examination of its expert during trial, judge vacated verdict and ordered new trial); ***Leka v. Portuondo***, 257 F.3d 89 (2d Cir. 2001) (three days too close when exculpatory information hidden); ***United States v. Gil***, 297 F.3d 93 (2d Cir. 2002) (two days with 2700 pages too close).

J. *Brady* may apply to pleas. ***Ferrara v. United States***, 456 F.3d 278 (2d Cir. 2008) (where misconduct so egregious that it makes plea involuntary). *But see* ***United States v. Ruiz***, 536 U.S. 622 (2002) (in ordinary case, no obligation to disclose impeaching material before plea). *Compare* ***Lafler v. Cooper***, 132 S.Ct. 1376 (2012) and ***Missouri v. Frye***, 132 S.Ct. 1399 (2012) (plea negotiations are a critical stage of proceedings requiring effective assistance of counsel)(I know, duh! But still, consider what we should argue that we need to know to effectively advise our clients).

K. Specific requests get better results. *See* ***United States v. Rivas***, 377 F.3d 195 (2d Cir. 2004) (Remanded for new trial where government failed to disclose a

witness' statement that could be seen as exculpatory under the defense theory despite the government's claim that statement was inculpatory). *See also* ***United States v. DeCologero,*** 530 F.3d 36 (1st Cir. 2008)(no relief without request for specific materials); ***United States v. Pelullo,*** 399 F.3d 197, 218 (3d Cir. 2005)(where prosecutor has no reason to know of *Brady* material in file unrelated to case, defendant must make specific request); ***Johnson v. Gibson***, 169 F.3d 1239 (10th Cir. 1999)(specific request can lower threshold of materiality required); ***United States v. Hanna***, 55 F.3d 1456 (9th Cir. 1995). Because the standard for dealing with specific requests is unclear, *Brady* requests should be as specific and as closely tied to the facts as possible.

L. ***United States v. Shaygan***, 652 F.3d 1297 (11th Cir. 2011) (government's failure to disclose that two of its witnesses were confidential informants resulted in recall of witnesses and instruction by court to jury, jury found defendant not guilty on all counts - struggle for sanctions against government still proceeding).

M. Remember - *Brady* was a sentencing case! *See* ***United States v. Quinn***, 537 F. Supp. 2d 99 (D.D.C. 2008).

N. *Brady* extends to entire prosecution team, so need to find out who's on it. ***Kyles v. Whitley***, *supra;* ***United States v. Gupta***, 11 CR 907 (JR)(S.D.N.Y. Mar. 27, 2012) (Court rejected prosecutor's argument that it had no obligation to review SEC interview memos of 44 potential witnesses for potentially exculpatory material because investigations were not joint, and ordered disclosure of all *Brady* material), *available at* http://lawprofessors.typepad.com/files/gupta-brady-ruling.pdf.

In general, the test applied is whether or not the agency is considered to be "an arm of the prosecution."

1. **Police are an arm of the prosecution for *Brady* purposes.** ***United States v. Price***, 566 F.3d 900 (9th Cir. 2009); ***United States v. Brooks***, 966 F.2d 1500 (D.C. Cir. 1992)(defense may make showing requiring government search of police files); ***United States v. Perdomo***, 929 F.2d 967 (3d Cir. 1991)(prosecutor must search local records for information re key witness' background); ***East v. Scott***, 55 F.3d 996 (5th Cir. 1995)(prosecution must conduct investigation of witnesses' criminal backgrounds); ***Walker v. Lockhart***, 763 F.2d 942 (8th Cir. 1985)(transcript of taped conversation); ***Freeman v. Georgia***, 599 F.2d 65 (5th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980)(police concealment of eyewitness); ***United States v. Boyd***, 883 F. Supp. 1277 (N.D. Ill. 1993), *aff'd*, 55 F.3d 239 (7th Cir. 1995) (in El Rukn case, all members of investigative team, including police officers were part of prosecution

team); ***Banks v. Reynolds***, 54 F.3d 1508 (10th Cir. 1995)(fact that defense knew others had previously been arrested for crime did not relieve prosecution of obligation of disclosing information).

But cf. ***United States v. Moeno-Morales***, 334 F.3d 140 (1st Cir. 2003); ***Blackmon v. Scott***, 22 F.3d 560 (5th Cir.), *cert. denied* 115 S. Ct. 915 (1994) (information related by witness about defendant's personality was information already known to defendant and not discoverable under *Brady*); ***United States v. Moore***, 25 F.3d 563 (7th Cir.), *cert. denied*, 115 S. Ct. 671 (1994) (prosecution not required to seek out witness prior conviction where prosecution had no knowledge of conviction); ***United States v. Young***, 20 F.3d 758 (7th Cir. 1994) (where government diligently searched records known to it, not required to seek out witness' unknown criminal history in another state).

2. **DEA agent**, ***United States v. Blanco***, 392 F.3d 382 (9th Cir. 2004)(DEA knowledge of informant's immigration status was relevant impeachment); ***United States v. Morell***, 524 F.2d 550 (2d Cir. 1975) (suppression of a confidential file on informant). *Cf.* ***Carvajal v. Dominguez***, 542 F.3d 561 (7th Cir. 2008)(Section 1983 case assumes DEA agent was arm of prosecution).

3. **Medical examiner**, ***Paradis v. Ararve***, 240 F.3d 1169 (9th Cir. 2001)(prosecution's notes re medical examiner's opinion on time of death were potentially exculpatory on issue in case and subject to disclosure); ***Foster v. Delo***, 54 F.3d 463 (8th Cir. 1995).

4. **U.S. Post Office**, *United States v. Deutsch*, 475 F.2d 55 (5th Cir. 1977)(personnel files).

5. **Parole officer is <u>not</u> an arm of the prosecution for *Brady* purposes.** ***Pina v. Henderson***, 752 F.2d 47 (2d Cir. 1985).

6. **In general, FBI records are treated as if in the constructive possession of the prosecution.** ***United States v. Brooks***, 966 F.3d 1500 (D.C. Cir. 1992)(prosecution must search FBI records); *Briggs v. Raines*, 652 F.2d 862, 865 (2d Cir. 1985)(homicide victim's rap sheet).

7. **CIA affidavit containing exculpatory material.** *United States v. Diaz-Munoz*, 632 F.2d 1330 (5th Cir. 1980).

8. **Some disagreement exists regarding prosecution's duty to disclose information contained in public records.** Cases holding there is a duty:

Johnson v. Dretke, 394 F.3d *332* (5th Cir. 2004); ***United States v. Isgro***, 974 F.2d 1091 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1581 (1993) (prosecution required to disclose transcript of key witness containing inconsistent statements, Jencks Act does not apply to trial transcripts in public domain). *See generally* ***Banks v. Dretke***, 124 S. Ct. 1256, 1272-73 (2004).

Contra: ***Bell v. Bell***, 512 F.3d 223 (6th Cir. 2008); ***United States v. Senn***, 129 F.3d 886 (7th Cir. 1997); ***United States v. Bi-CoPowers, Inc.***, 741 F.2d 730, 736 (5th Cir. 1984)(no general public record exception to *Brady*).

9. ***Brady* may be satisfied, however, if a prosecutor discloses how to obtain a public record.** ***Chavis v. North Carolina***, 637 F.2d 213 (4th Cir. 1980). *Cf.* ***Banks v. Dretke***, 540 U.S. 668 (2004)(giving defendant just enough to "seek out" evidence does not meet due process standard).

O. *Brady* does not extend to post-conviction proceedings. ***District Attorney's Office v. Osborne***, 129 S. Ct. 2308 (2009). *Cf.* ***D'Amario v. Davis***, 2010 WL 537807 (D. Colo. 2010)(limiting *Osborne*).

V. How Prosecution Views Law - "Same as it ever was?"

A. 1997 experiment by John Jay Legal Clinic of Pace Law School, New York,

B. Ted Stevens case (2008). For a full history of the shameful saga of the Ted Stevens case, see "Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order, Dated April 7, 2009," filed by Henry F. Schuelke & William Shields, March 15, 2012 (514 pages), *available at* www.legaltimes.typepad.com/files/shuelke-report.

C. In 2010, USA Today ran its own investigation of federal prosecutors, documenting 86 cases since 1997 where judges found that federal prosecutors had failed to disclose favorable evidence. Brad Heath and Kevin McCoy, *Prosecutors' Conduct Can Tip Justice Scales*, USA Today Sept. 23, 2010.

VI. Ethical Rules

A. Model Rule 3.8(d) - Prosecution must timely disclose "all evidence or information known to [them] that tends to negate guilt . . . or mitigates the offense." No materiality requirement.

B. ABA Formal Opinion 09-454 (July 8, 2009): Prosecution's ethical obligations broader than its legal obligations, citing ***Cone v. Bell***, 129 S. Ct. 1783 (2009); ***Kyles v. Whitley***, 115 S. Ct. 1555 (1995).

C. In practice (so far):

1. ***Connick v. Thompson***, 131 S. Ct. 1350 (2011) (In sec. 1983 case, despite conceded significant *Brady* violation (or violations), including the prosecution's withholding of a blood sample that showed the perpetrator had a different blood type than the defendant, the Court held there was an insufficient pattern of violations to find a failure to properly train and that the DA's office could rely on things like law school, bar exam preparation, supervisory review of assistants' actions and CLE (hah!)).

2. ***Cash v. Maxwell***, 132 S. Ct. 611 (2012) (case denying cert and upholding 9th Circuit ruling reversing state court's ruling that no credible evidence showed police informer lied when facts showed that the informer had testified in at least 24 different cases to an identical fact pattern and had been called a liar by various police officers and prosecutors; statement of Justice Sotomayor worth reading).

VII. United States Attorney's Manual, Section 9-5000 *et seq.*, requiring prosecutors "to go beyond the minimum obligations required by the Constitution and establish[ing] broader standards for the disclosure of exculpatory and impeachment information." No enforcement mechanism, aspirational only, but worth citing.

VIII. Department of Justice Memoranda from Deputy Attorney General David W. Ogden dated January 4, 2010, establishing guidance for prosecutors regarding criminal discovery, at www.justice.gov/dag:

1. Requirement for Office Discovery Policies in Criminal Matters

2. Issuance of Guidance and Summary of Actions Taken in Response to the Report of the Department of Justice Criminal Discovery and Case Management Working Group

3. Guidance for Prosecutors Regarding Criminal Discovery

IX. **Identify in your motion and request all aspects casting doubt upon the witness' credibility,** citing *Brady, Bagley, Giglio v. United States*, 405 U.S. 150 (1972) and *Kyles v. Whitley*, including:

A. Impeaching evidence that is cumulative of evidence already disclosed may not be *Brady*. ***Conley v. United States***, 415 F.3d 183 (1st Cir. 2005) (Government's failure to disclose impeaching information, including an FBI memorandum was material and not cumulative where impeachment was of key government witness on witness's ability to recall events, undermining confidence in the verdict). *But see* ***United States v. Sipe***, 388 F.3d 471 (5th Cir. 2004) (Court upheld *Brady* violation based on cumulative nondisclosures including government star witness' dislike of the defendant, the criminal history of the government's star witness and affirmative misrepresentations about benefits given to testifying illegal aliens).

B. Unwritten deals with witnesses must be disclosed. ***Silva v. Brown***, 416 F.3d 980 (9th Cir. 2005) (*Brady* violations reviewed de novo, here government's failure to disclose its (amazing) deal with chief witness that witness not undergo psychiatric evaluation before testifying was material and impeaching).

C. Inconclusive test results may be *Brady* evidence. ***Simmons v. Beard***, F.3d (3d Cir. 2009); ***Patler v. Slayton***, 503 F.2d 472 (4th Cir. 1974).

D. Prosecution's failure to disclose significant benefits, including immunity, given to a crucial witness as well as allowing witness to perjure herself, was material to one aspect of the case - but not all! and required reversal on that aspect alone. ***Phillips v. Ornoski***, 673 F.3d 1168 (9th Cir. 2012). *See also* ***Guzman v. Dep't of Corr.***, 698 F. Supp. 2d 1317 (M.D. Fla. 2010), aff'd, 663 F.3d 1336 (11th Cir. 2011).

1. **Prior inconsistent statements.** ***Smith v. Cain,*** 132 S. Ct. 627 (2012) (prior witness statements showed said could not identify defendant); ***United States v. Kohring***, 637 F.3d 895 (9th Cir. 2011)(inconsistent recollections were material); ***United States v. Noriega et al. (Lindsey Manufacturing)***, 2011 U.S. Dist. LEXIS 138439 (C.D. Cal. Dec. 1, 2011)(massive misconduct, including government failure to disclose grand jury transcripts of agent's testimony that contradicted trial evidence until after trial began required dismissal of indictment); ***Goudy v. Basinger***, 604 F.3d 394 (7th Cir. 2010) (habeas case, prior misidentification); ***United States v. Hanna***, 55 F.3d 1456 (9th Cir. 1995)(discrepancies between law enforcement officers and reports and grand jury testimony).

2. **Bias.** See generally ***United States v. Abel***, 469 U.S. 45 (1984).

   a) Hostility. ***United States v. Aviles-Colon***, 536 F.3d 1 (1st Cir. 2008)(DEA report containing information regarding ongoing hostility between defendant and leader of drug conspiracy); ***United States v. Sipe***, 388 F.3d 471 (5th Cir. 2004)(dislike of defendant).

b) Pecuniary or other interest. ***Bell v. Bell***, 460 F.3d 739 (6th Cir. 2006)(disclosure required where, although no express agreement between prosecution and witness, prosecution knew of witness' expectation for deal and fulfilled that expectation); ***United States v. Blanco***, 391 F.3d 382 (9th Cir. 2004)(fact that investigating agency kept evidence of informant's immigration benefits from prosecution did not justify nondisclosure); ***United States v. Strifler***, 851 F.2d 1197 (9th Cir. 1988)(information contained in witness' probation file should have been disclosed because it related to his motives for informing as well as his tendency to overcompensate for problems and to lie).

c) Kinship with person adverse to client.

d) Favors from prosecution such as telephone calls, conjugal visits, etc. ***United States v. Salem***, 578 F.3d 682 (7th Cir. 2009)(witnesses' involvement in uncharged murder should have been disclosed as motive to testify to avoid murder charges); *See* El Rukn cases, ***United States v. Andrews***, 824 F. Supp. 1273 (N.D. Ill. 1993); ***United States v. Burnside***, 824 F. Supp. 1215 (N.D. Ill. 1993); ***United States v. Boyd***, 883 F. Supp. 1227 (N.D. Ill. 1993).

3. **Character of witness.** ***United States v. Brumel-Alvarez***, 991 F.2d 1452 (9th Cir. 1992) (reversible error not to disclose government memorandum written to government agent highly critical of key government informant); ***United States v. Bernal-Obeso***, 989 F.2d 331 (9th Cir. 1993)(remand to determine whether government witness lied to DEA about his prior criminal record).

4. **Witness' capacity to observe.**

a) Logistics. ***Ballinger v. Kerby***, 3 F.3d 1371 (10th Cir. 1993)(failure to produce photo tending to impeach witness's statement he could see out of window was *Brady* violation).

b) Use of alcohol or drugs. ***United States v. Robinson***, 583 F.3d 1265 (10th Cir. 2009)(CI's drug use was Brady based on CI's centrality to case); ***King v. Ponte***, 717 F.2d 635 (1st Cir. 1983)(witness under heavy medication as treatment for unstable mental condition); ***Williams v. Whitley***, 940 F.2d 132 (5th Cir. 1991)(sole eyewitness had been to methadone clinic within 2 hours of crime).

c) Hypnosis. ***Jean v. Rice***, 945 F.2d 82 (4th 1991)(State's failure to disclose that two of its key witnesses had been hypnotized and that tape recordings and records of hypnosis procedures existed, was error).

5. **Testimony which is inconsistent with other evidence.** ***Mesarosh v. United States***, 352 U.S. 1 (1956); ***Jaramillo v. Stewart***, 340 F.3d 877 (9th Cir. 2003)(witness's testimony would have contradicted other witnesses); ***Leka v. Portuondo***, 257 F.3d 89 (2d Cir. 2001)(inconsistent evidence - here eyewitness - need not be wholly exculpatory nor completely hidden by prosecution to violate *Brady*); ***Johnson v. Brewer***, 521 F.2d 556 (8th Cir. 1975); ***Clemmons v. Delo***, 124 F.3d 944 (8th Cir. 1997)(*Brady* violation where prosecution failed to disclose witness' memo accusing third party of committing crime); *Ganci v. Berry*, 702 F. Supp. 400 (E.D.N.Y. 1988), *aff'd*, 896 F.2d 543 (2d Cir. 1990)(statements of witnesses describing perpetrator's eye color different than defendant's).

6. **Prior bad acts.**

7. **Presentence reports of witnesses or co-defendants.** *See* ***United States v. McGee***, 408 F.3d 966 (7th Cir. 2005)(defendant may request in camera review of PSI to determine if it contains *Brady* material); ***United States v. McKinney***, 758 F.2d 1036, 1048 (5th Cir. 1985) (portion of the report relating to the witness' criminal record). Some courts have developed a two-tiered analysis for the disclosure of presentence reports:

a) Material which is exculpatory must be disclosed. ***United States v. Figurski***, 545 F.2d 389 (4th Cir. 1976).

b) Material which merely impeaches the witness is discoverable only where there is a reasonable likelihood of affecting the trier of fact. ***United States v. Anderson***, 724 F.2d 596, 598 (7th Cir. 1984)(quoting *Figurski*, 545 F.2d at 391-92).

c) After *Bagley*, this distinction would no longer seem to be viable, unless the courts determine that the privacy interests at stake warrant greater protection with regard to disclosure of presentence reports.

8. **Autopsy reports.** ***Anderson v. South Carolina***, 709 F.2d 887 (4th Cir. 1983)(per curiam).

9. **Witness' inability to recall, including drug use.** ***United States v. Robinson***, 956 F.2d 1388 (7th Cir.), *cert. denied*, 113 S. Ct. 654 (1992).; ***Conley v. United States***, 332 F. Supp.2d 302 (D. Mass. 2004).

E. **Obtain all relevant information on agents who interviewed your client, including, if possible:**

1. **The agents' background or training;**

2. **Prior transcripts of cases in which the agent testified.** *See* ***United States v. Meyer***, 398 F.2d 66 (9th Cir. 1968); ***McConnell v. United States***, 393 F.2d 404 (5th Cir. 1968).

3. **Agents' personnel files.** *United States v. Booth*, 309 F.3d 566 (9th Cir. 2002); *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991). *But see United States v. Herring*, 83 F.3d 1120 (9th Cir. 1996). *See* Section I.

F. **Request all material which tends to impeach a government witness**, *United States v. Bagley*, 473 U.S. 667(1985); *Giglio v. United States*, 405 U.S. 150 (1972); *Boone v. Paderick*, 541 F.2d 447 (4th Cir. 1976), *cert. denied*, 430 U.S. 959 (1977); including:

1. **Any formal or informal promises to reward a witness.** *Banks v. Dretke*, 540 U.S. 668 (2004); *Bagley*, 473 U.S. 667 (1985); *Harris v. Lafler*, 553 F.3d 1028 (6th Cir. 2009)(police officers' promises to witness must be disclosed regardless of whether police failed to tell prosecution; prosecution has due diligence obligation to discover evidence); *Tassin v. Cain*, 517 F.3d 770 (5th Cir. 2008). This includes informal understandings. *See Blanton v. Blackburn*, 494 F. Supp. 895 (M.D. La. 1980), *aff'd without opinion*, 654 F.2d 719 (5th Cir. 1981)(informal plea agreement, witness denied existence).

   But see *Bell v. Bell*, 512 F.3d 223 (6th Cir. 2008)(although tacit agreements must be disclosed, a witness's expectation is not enough without some assurance or promise by prosecution); *Shabazz v. Artuz*, 336 F.3d 154 (2d Cir. 2003)(prosecution's intent insufficient to mandate disclosure unless communicated to witness).

2. **Witness' parole or probation status.** *Davis v. Alaska*, 415 U.S. 308 (9th Cir. 1974); *Reutter v. Solem*, 888 F.2d 578 (8th Cir. 1989)(prosecution must disclose that key witness had applied for sentence commutation and was scheduled to appear before parole board shortly); *Meeks v. United States*, 163 F.2d 599 (9th Cir. 1947).

3. **Promises as to witness' civil tax or administrative liability.** *United States v. Shaffer*, 789 F.2d 682 (9th Cir. 1986); *United States v. Wolfson*, 437 F.2d (2d Cir. 1970); *United States v. Dawes*, 1990 US Dist. LEXIS (D. Kan. Oct. 15).

4. **Help in forfeiture proceedings.** *United States v. Parness*, 408 F. Supp. 440 (S.D.N.Y. 1975).

5. **Money or other reward.** ***United States v. Thornton***, 1 F.3d 149 (3d Cir.), *cert. denied*, 114 S. Ct. 483 (1993); ***Wheeler v. United States***, 351 F.2d 946 (1st Cir. 1965).

6. **Living expenses.**

7. **Medical treatment.** ***United States v. Robinson***, 583 F.3d 1265 (10th Cir. 2009)(prosecution's failure to disclose involuntary commitment of its star witness six days before trial was error).

8. **Transportation expenses.**

9. **Witness protection program.** ***United States v. Edwards***, 191 F. Supp.2d (D.D.C. 2002)(defendant entitled to relevant portions of witness protection or psychiatric reports); ***United States v. LaFuente***, 991 F.2d 1406 (8th Cir. 1993) (remand to determine if fact was material), *appeal after remand*, 54 F.3d 457 (8th Cir.) *cert. denied*, 64 U.S.L.W. (1995); ***United States v. Librach***, 520 F.2d 550 (8th Cir. 1975). *Cf.* ***United States v. Marino***, 658 F.2d 11 6th Cir. 1981)(fact that witness was participating in the witness protection program did not damage witness' credibility or diminish the accuracy of information given).

10. **Informant status or files.** ***Banks v. Dretke***, 540 U.S. 668 (2004); ***United States v. Halbert***, 668 F.2d 489, 496 (10th Cir.), *cert. denied*, 456, U.S. 934 (1982); ***United States v. Disston***, 582 F.2d 1100 (7th Cir. 1978); ***United States v. Phillips***, 854 F.2d 273(7th Cir. 1988)(informer files).

11. **Threats for failure to testify.** ***Banks v. Dretke***, 540 U.S. 668 (2004); ***United States v. Sutton***, 542 F.2d 1239 (4th Cir. 1976).

12. **Witness' tax returns - especially for informant.** See Internal Revenue Code § 6103(i)(1)(2). ***United States v. Lloyd***, 992 F.3d 348 (D.C. Cir. 1993)(remanded for hearing); ***United States v. Wigoda***, 521 F.2d 1221 (7th Cir. 1975)(in camera inspection); ***Johnson v. Sawyer***, 640 F. Supp. 1126 (D. Tex. 1986)(tax returns may be disclosed).

13. **Prior criminal convictions.** ***Turner v. Schriver***, 327 F. Supp. 2d 174 (E.D.N.Y. 2004); ***East v. Scott***, 55 F.3d 996 (5th Cir. 1995)(prosecution has duty to investigate its witnesses' criminal histories); ***United States v. Montes-Cardenas***, 746 F.2d 771 (11th Cir. 1984); ***United States v. Recognition Equipment, Inc***, 711 F. Supp. 1, 14 (D.D.C. 1989).

14. **FBI rap sheets.** ***Martinez v. Wainwright***, 621 F.2d 184 (5th Cir. 1980)(of homicide victim); ***Briggs v. Paines***, 652 F.2d 862 (9th Cir. 1981)(same); ***Perkins v. LeFeore***, 691 F.2d 616 (2d Cir. 1982)(of witness). *Cf.* ***Boyer v. Redmann***, 553 F. Supp. 219 (D. Del. 1982)(no obligation to produce victim's rap sheet absent specific request.)

15. **Reports of polygraph tests performed upon government witnesses.** ***United States v. Edwards***, 191 F. Supp. 2d 88 (D.D.C. 2002). This applies to oral as well as written reports. ***Carter v. Rafferty***, 826 F.2d 1299 (3d Cir. 1987), *cert. denied*, 484 U.S. 1011 (1988). *But see* ***Wood v. Bartholomew***, 116 S. Ct. 7 (1995)(no *Brady* violation found where prosecution failed to disclose that codefendant testifying for prosecution was not completely truthful on polygraph).

16. **Fact that witness was target of investigation and threatened with prosecution, even if witness never charged.** ***Moynihan v. Manson***, 419 F. Supp. 1139 (D. Conn. 1976), *aff'd without opinion*, 559 F.2d 1204 (2d Cir.), *cert. denied*, 434 U.S. 939 (1977).

17. **"El Rukn" type benefits -- free telephones, contact and conjugal visits, alcohol, clothing, failure to prosecute for drug use.** Also goes to bias.

18. **Agreement to forego psychiatric evaluation of witness.** ***Silva v. Brown***, 416 F.3d 980 (9th Cir. 2005).

G. **Request witness' personnel file.** ***United States v. Dominguez-Villa***, 954 F.2d 562 (9th Cir. 1992)(limited to federal personnel only); ***United States v. Henthorn***, 931 F.2d 29 (9th Cir. 1991)(defense has right to request that prosecution review FBI agent's personnel files for past instances of dishonesty or misconduct under *Brady*); ***United States v. Garrett***, 542 F.2d 23 (6th Cir. 1976); ***United States v. Deutsch***, 475 F.2d 55 (5th Cir. 1973); ***United States v. Austin***, 492 F. Supp. 502 (N.D. Ill. 1980). *Cf.* ***United States v. Muse***, 708 F.2d 513 (10th Cir. 1983)(request for personnel files was overly broad and superfluous in light of other *Brady* requests for impeachment evidence).

H. **Request rules and regulations governing procedure in a case to determine if they were followed.**

I. **Request any psychiatric treatment of witness.** ***United States v. Lindstrom***, 698 F.2d 1154 (11th Cir. 1983); ***United States v. Smith***, 77 F.3d 511 (D.C. Cir. 1996)(Government failure to disclose witness's psychiatric history and plea agreement was material under *Brady* and *Kyles*; case remanded). *Cf.* ***United States v. Burns***, 668 F.2d 855 (5th Cir. 1982)(where defendant requested psychiatric records indicating drug and alcohol related problems, he was not entitled to receive records regarding group transactional therapy for personal problems); ***United States v. Driver***, 798 F.2d 248 (7th Cir. 1986)(psychological report not material.)

X. Introduction of new legislation by Alaska Senator Lisa Murkowski on March 15, 2012 entitled the **"Fairness in Disclosure of Evidence Act of 2012,"** (S. 2197), following release of Schuelke Special Report to Judge Sullivan on prosecutorial misconduct in Ted Stevens case. Senate Judiciary Committee held hearing on bill on June 6, 2012.

STATE OF MICHIGAN

COURT OF APPEALS

PAUL H. GILLETT,

Plaintiff/Appellant-Cross Appellee,

v

MICHIGAN FARM BUREAU, PAT BLANCHETT and TOM WISEMAN,

Defendants/Appellees-Cross Appellants.

UNPUBLISHED
December 22, 2009

No. 286076
Eaton Circuit Court
LC No. 07-001044-CK

Before: Meter, P.J., and Murphy, C.J., and Zahra, J.

PER CURIAM.

Plaintiff appeals by right the trial court's dismissal of plaintiff's lawsuit with prejudice as a sanction for plaintiff's spoliation of evidence. Defendants cross-appeal the trial court's denial of defendants' request for attorney fees. We affirm both the dismissal and the denial of attorney fees.

I. Basic Facts and Proceedings

Plaintiff's lawsuit arose out of alleged sexual harassment by defendants in his workplace. Plaintiff resigned from the workplace, then retained an attorney to pursue possible causes of action against defendants. His attorney wrote a demand letter to defendants, and shortly thereafter defendants' attorney responded with a notification that plaintiff should preserve his personal e-mails. Plaintiff's attorney acknowledged defendants' notification, and informed defendants that plaintiff would submit his personal e-mails and his personal laptop computer hard drive for defendants' inspection.

Subsequently, in plaintiff's deposition, plaintiff acknowledged that he had deleted e-mails from his personal account after receiving the notification from defendants. In addition, a forensic analysis of plaintiff's computer indicated that he had deleted massive numbers of files from the hard drive shortly before plaintiff submitted his computer for defendants' inspection. The forensic analyst determined that the deleted files were not recoverable, and opined that the deletions were intended to interfere with the discovery process. The analyst also noted that although plaintiff claimed the deletions were due to his uninstallation of problematic software, that software was still installed on plaintiff's computer.

II. Dismissal

On appeal, plaintiff contends that the trial court abused its discretion by imposing the drastic sanction of dismissal. Plaintiff specifically claims that the trial court failed to consider other less draconian sanctions, and failed to determine whether the deleted electronic evidence was relevant.

A. Standard of Review

We review the trial court's decision for clear abuse of discretion. *Citizens Ins Co of America v Juno Lighting, Inc*, 247 Mich App 236, 242-243; 635 NW2d 379 (2001). A trial court abuses its discretion if the court's decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

B. Analysis[1]

Initially, we note that the newly-adopted MCR 2.313(E), which in part provides that "a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system" is not applicable because it was not in effect at the time the trial court issued the order of dismissal.

Nonetheless, trial courts have inherent power to impose sanctions upon parties for failing to preserve evidence that the parties knew or should have known was relevant to pending or potential litigation. *Bloemendaal v Town & Country Sports Ctr, Inc*, 255 Mich App 207, 211; 659 NW2d 684 (2002).[2] As this Court has explained, "[i]n cases involving the loss or destruction of evidence, a court must be able to make such rulings as necessary to promote fairness and justice." *Brenner v Kolk*, 226 Mich App 149, 160; 573 NW2d 65 (1997). Inherent power is distinct from the trial court's authority under the MCR 2.313 to sanction parties for failure to comply with discovery orders. *Id*. at 158-159. However, dismissal is a drastic sanction that is suitable when a party engages in egregious conduct. *Id.*, at 163. A trial court considering spoliation sanctions must evaluate all potential sanctions before ordering a dismissal. *Bloemendaal*, *supra* at 214.

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[1] We note that the newly-adopted MCR 2.313(E), which in part provides that "a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system" is not applicable because it was not in effect at the time the trial court issued the order of dismissal.

[2] "The phrase 'inherent powers' is used to refer to powers included within the scope of a court's jurisdiction and that a court possesses irrespective of specific grant by constitution or legislation." *Brenner v Kolk*, 226 Mich App 149, 158; 573 NW2d 65 (1997), citing 20 Am Jur2d, Courts, § 43, p 363.

Here, plaintiff acknowledged that he deleted e-mails, but maintained that the deletion was a result of his routine procedures rather than a deliberate attempt to destroy evidence. Plaintiff submitted an affidavit stating "I . . . have never intentionally deleted any electronic information from my personal computer in an effort to hide or destroy such information as it may relate to my pending case. . . . [I]f electronic information on my personal computer has been lost, it is the result of my routine, good faith operation of my computer." The trial court clearly rejected plaintiff's contention, finding the number of data files deleted to be "[e]xtremely significant." Specifically, the court observed that plaintiff deleted on average 2,000 files each month through September 2007, but that in October 2007 the deletions increased to more than 200,000 files, with an additional 28,000 files deleted in the first six days of November. The trial court did not abuse its discretion in concluding that plaintiff's deletion of discoverable material was not in good faith.

We further conclude that the trial court acted within its discretion when it dismissed plaintiff's lawsuit as a sanction. Although the seasoned trial judge did not expressly recite on the record the litany of alternative sanctions short of dismissal that were available to him, the record clearly establishes that he was fully aware of his options and that he employed the sanction of dismissal with due care. The trial court expressly recognized that the sanction of dismissal was a drastic measure that should rarely be employed. The trial court further stated, "I've carefully considered all my options. I've reviewed very carefully the cases, especially the federal cases[,] that are cited by the attorney for the defendant. I've compared those cases to what we have here in the instant situation."

The trial court relied heavily on *Leon v IDX Systems Corp*, 464 F3d 951 (CA 9, 2006), a case in which the federal district court explored the many sanctions short of dismissal before it concluded that dismissal was the appropriate sanction. Like the instant case, *Leon* involved the spoliation of discoverable materials from a laptop computer. Similar to this case, there was no manner in which to verify recovery of all the deleted information and no way to know the content of the deleted information. Also, plaintiff's "spoliation threatened to distort the resolution of the case . . . because any number of the . . . files could have been relevant to [defendants'] claims or defenses, although it is impossible to identify which files and how they might have been used." *Id*. at 960. Although plaintiff here maintains that the deleted information would only have been used to impeach plaintiff's testimony at trial, we agree with defendants that plaintiff "did not have the authority to make unilateral decision about what evidence was relevant in this case." *Leon, supra* at 956-957.

We conclude the trial court properly explored its many options before dismissing plaintiff's lawsuit. Accordingly, we hold that the trial court's decision was within the range of principled outcomes. See *Bloemendaal, supra* at 207; accord, *Leon, supra*.

III. Attorneys Fees

A. Standard of review

This Court reviews a trial court's ruling on monetary sanctions for clear abuse of discretion. *Persichini v William Beaumont Hosp*, 238 Mich App 626, 642; 607 NW2d 100 (1999).

B. Analysis

On cross-appeal, defendants argue that the trial court abused its discretion by failing to impose monetary sanctions upon plaintiff.

A trial court has inherent power to impose attorney fees as sanctions for "egregious misconduct of a party or an attorney, such as conduct that causes a mistrial." *Persichini*, *supra*, 238 Mich App at 640-641. When considering a monetary sanction, the trial court should "balance the harshness of the sanction against the gravity of the misconduct." *Id*. at 642.

Defendants first posit that that the trial court disregarded its obligation to consider monetary sanctions. However, our review of the record indicates that the court considered sanctioning plaintiff but reluctantly declined to sanction plaintiff.

Defendants also maintain that the trial court should have imposed sanctions to "make [d]efendants whole for their motion practice and related costs to address the evidence spoliation" and to deter other litigants from similar spoliation. We find no abuse of discretion in the court's denial of monetary sanctions. See *Persichini v William Beaumont Hosp*, 238 Mich App 626, 642; 607 NW2d 100 (1999). We reject the implication asserted by defendants that a dismissal based on spoliation of evidence entails the imposition of a sanction. While the trial court rejected plaintiff's claim that he inadvertently deleted messages, the trial court did not indicate that plaintiff acted in bad faith. Rather, the trial court simply concluded that plaintiff acted improperly in deleting information. We iterate that a court abuses its discretion only if the court's decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Here, the trial court dealt appropriately with plaintiff's conduct by dismissing the case and the court's refusal to impose an additional sanction was not unreasonable or unprincipled.

Affirmed. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Patrick M. Meter
/s/ Brian K. Zahra

STATE OF MICHIGAN

COURT OF APPEALS

PAUL H. GILLETT,

Plaintiff/Appellant-Cross Appellee,

v

MICHIGAN FARM BUREAU, PAT BLANCHETT, and TOM WISEMAN,

Defendant/Appellees-Cross Appellants.

UNPUBLISHED
December 22, 2009

No. 286076
Eaton Circuit Court
LC No. 07-001044-CD

Before: Meter, P.J., and Murphy, C.J., and Zahra, J.

MURPHY, C.J. (*dissenting*).

I respectfully dissent. Although I agree with the majority's conclusion that the trial court did not abuse its discretion in concluding that plaintiff's deletion of discoverable electronic material was not in good faith, I find that the trial court did not properly consider the availability of less drastic sanctions as required under Michigan law. For this reason, I would hold that the trial court abused its discretion by imposing the sanction of dismissal.

"Dismissal is a drastic step that should be taken cautiously." *Brenner v Kolk*, 226 Mich App 149, 163; 573 NW2d 65 (1997). For this reason, this Court stated in *Brenner* that before a trial court may impose such a sanction, it "is required to carefully evaluate all available options on the record." *Id.*

When imposing the sanction of dismissal in this case, the trial court stated as follows: "I've carefully considered all my options." The court said nothing more. It neither stated on the record what other options it had nor why the sanction of dismissal was the most appropriate option. Therefore, by failing to "carefully evaluate all [its] available options on the record," the trial court abused its discretion by imposing the sanction of dismissal. *Id.*; see also *Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 506-507; 536 NW2d 280 (1995) ("Here, because the trial court did not evaluate other available options on the record, it abused its discretion in dismissing the case.").

The majority acknowledges that the trial court did not expressly consider alternative sanctions on the record. However, the majority concludes that the trial court's failure to do so was of little consequence because the record indicates that the trial court relied heavily on *Leon v IDX Systems Corp*, 464 F3d 951, 958 (CA 9, 2006), in concluding that dismissal was warranted.

Although *Leon* is factually analogous to this case, it is different in one significant respect—the trial court in *Leon* acted in accordance with the law of its jurisdiction before imposing a sanction of dismissal. The same cannot be said here.

In *Leon*, the Ninth Circuit also required the trial court to consider alternative sanctions. See *Leon*, 464 F3d at 958. Specifically, it stated that a trial court "must contemplate 'less severe alternatives' than outright dismissal." *Id.*, citing *United States ex rel Wiltec Guam, Inc v Kahaluu Constr Co*, 857 F2d 600, 604 (CA 9, 1988). Moreover, the Ninth Circuit considered whether the trial court "explicitly discussed the feasibility of less drastic sanctions and explained why such alternate sanctions would be inappropriate." *Id.* at 960. Although the Ninth Circuit imposed a sanction of dismissal, it did so after determining that the trial court satisfied this requirement. See *id.* at 960–61.

Thus, not only did the trial court in this case fail to properly consider less drastic sanctions on the record as required by Michigan law, but it also failed to do so in accordance with *Leon*—the case it relied upon for its decision. Consequently, whether the trial court dismissed this case because that is what happened in *Leon* or because it concluded that dismissal was the most appropriate sanction in light of all its available options is an open question. Contrary to the majority's opinion, I do not believe that the former can serve as a sufficient basis for a sanction of dismissal in this case. Although a factual comparison of this case to *Leon* may serve as a basis for the trial court to conclude that plaintiff's conduct was egregious and prejudicial to defendants, the facts and circumstances of *Leon* do not indicate why dismissal was the most appropriate sanction in the circumstances of this case. That is why the law of both Michigan and the Ninth Circuit require trial courts to reach this drastic conclusion only after they carefully consider all available options on the record.

Therefore, I would remand this case to the trial court so that it may determine an appropriate sanction after considering all its available options on the record.

/s/ William B. Murphy