

**CH. 15
DISCOVERY**

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§15-1

Generally - Evidence Favorable to Defense

[Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 \(1963\)](#) The State's suppression of evidence favorable to the accused, after a request for production, violates due process. See also, [Giles v. Maryland, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737 \(1967\)](#).

[United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 \(1976\)](#) The Court held that [Brady v. Maryland](#) arguably applies in three situations. First, where the undisclosed evidence shows perjury of which the prosecutor knew or should have known, the conviction is fundamentally unfair and "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Second, where there is a pretrial request for specific evidence and the subject matter of the request is material (or there is a substantial basis for claiming materiality), the prosecutor is required to either furnish the information or submit the problem to the judge. The failure to make any response is seldom excused; furthermore, due process is violated where the State suppresses requested evidence that is favorable to the defense. Finally, where there is no request, or only a general request for exculpatory matter, the test to be applied is "if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. The omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered there is no justification for a new trial."

[Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 \(1995\)](#) Constitutional error occurs where the State fails to disclose material exculpatory evidence, even if the defendant failed to request such evidence. To justify reversal there must be "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." The Court emphasized four principles to be followed in determining whether a Brady violation has occurred. First, a defendant establishes a "reasonable probability" of a different result where the State's failure to disclose evidence "undermines confidence in the outcome of the trial." Second, a defendant need not establish that he would have been acquitted had the undisclosed evidence been available - there may be a "reasonable probability" of a different result even where the evidence of guilt is sufficient to justify a conviction. Third, once it has been found that the State's failure to disclose exculpatory evidence was constitutional error, the harmless error rule does not apply. Fourth, whether undisclosed evidence is "material" must be determined "collectively, not item-by-item."

[Wood v. Bartholomew, 516 U.S. 1018, 116 S.Ct. 7, 133 L.Ed.2d 1 \(1995\)](#) Under Brady, the State must disclose only "material," exculpatory evidence. Evidence is "material" if there is a "reasonable probability" that its disclosure would have changed the result of the trial. Because results of polygraph tests of State's witnesses would have been inadmissible at defendant's trial, they could not have affected the verdict and disclosure was not required.

[Strickler v. Greene, 527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 286 \(1999\)](#) A Brady violation occurred where the prosecution failed to disclose evidence which cast doubt on the

identification of defendant by the State's principal witness. The undisclosed information would have impeached the testimony of the primary identification witness, and there was no dispute that at least some of the evidence was known to the State but not disclosed. However, defendant could not establish sufficient prejudice to show that the evidence was "material." Although there was a possibility that a different result might have occurred had the suppressed evidence been disclosed, that possibility did not undermine confidence in the verdict where there was other evidence to establish that defendant was involved in the offense, "considerable" forensic and other physical evidence linked defendant to the crime, and a guilty verdict did not depend on whether defendant's role in the offense was as the witness claimed.

[People v. Beaman, 229 Ill.2d 56, 890 N.E.2d 500 \(2008\)](#) Under [Brady v. Maryland, 373 U.S. 83 \(1963\)](#), due process is violated by the State's failure to disclose evidence which is favorable to the defendant and material to guilt or punishment. To prevail on a **Brady** claim, the defendant must show that: (1) the undisclosed evidence is favorable because it is either exculpatory or impeaching, (2) the evidence was suppressed by the State either willfully or inadvertently, and (3) the defense was prejudiced because the evidence is material to guilt or punishment. The **Brady** rule applies both to the intentional failure to disclose exculpatory evidence and where evidence is known to police but not to the prosecutor. The prosecutor has a duty to discover exculpatory evidence known to other government officials. Evidence is "material" if there is a reasonable probability that the result of the proceeding would have been different had it been disclosed. To establish materiality, the defense must show that the suppressed evidence could reasonably be taken to put the entire case in such a different light as to undermine confidence in the verdict. Materiality is determined by the cumulative effect of the suppressed evidence, not by considering each item of evidence individually. A **Brady** violation cannot be harmless error.

The State failed to disclose evidence favorable to the defendant at a trial for first-degree murder. The evidence showed that John Doe was regarded by police as a suspect in the murder, was evasive and nervous when questioned, avoided taking a polygraph examination by refusing to follow the examiner's instructions, was charged with domestic battery and possession of marijuana with intent to deliver, physically abused his girlfriend on numerous occasions, and was using steroids which caused him to act erratically. There was also evidence that the decedent owed John Doe money for drugs, giving the latter a motive for the offense. Such evidence, had it been disclosed, would have provided a viable basis for the defense to argue that John Doe was an alternative suspect. An accused may present evidence that someone else committed the charged offense if that evidence is neither remote nor speculative. The court noted that at trial, the prosecutor argued that all of the other potential suspects had been eliminated from consideration and that only defendant lacked a complete alibi. That argument would have been less persuasive had the evidence concerning Doe been disclosed and the defense argued that Doe was an alternative suspect.

[People v. Harris, 206 Ill.2d 1, 794 N.E.2d 314 \(2002\)](#) Defendant was convicted and sentenced to death. At his sentencing hearing, the complainant in an unrelated robbery testified concerning serious injuries which defendant caused during the robbery. Defendant subsequently filed a post-conviction petition alleging that the State had failed to correct known perjury by the robbery complainant. In support, defendant submitted the witness's medical records and a doctor's statement that the records did not corroborate the witness's claims concerning his injuries. The court found that the State has an affirmative duty to disclose evidence that is favorable to the defendant and material to either guilt or punishment. The

Brady rule applies where the undisclosed evidence demonstrates that the prosecution's case included perjured testimony of which the prosecution knew or should have known. Where known perjury is involved, the evidence is "material" if there is any reasonable likelihood that the false testimony could have affected the judgement. Defendant's post-conviction petition made a substantial showing of a reasonable likelihood that the robbery complainant's false testimony could have affected the verdict.

[People v. Woodrum, 223 Ill.2d 286, 860 N.E.2d 259 \(2006\)](#) Where an indictment fails to specify the details of the charged offense sufficiently to enable the defendant to prepare a defense, the State may be required to furnish a bill of particulars. The purpose of a bill of particulars is to give notice of the charge and the specific transactions at issue. A bill of particulars is unnecessary if the indictment sufficiently informs the defendant of the charged offense. The trial court's decision on a motion for a bill of particulars is reviewed for abuse of discretion.

[People v. Cloutier, 191 Ill.2d 392, 732 N.E.2d 519 \(2000\)](#) Where defendant was convicted of killing the decedent during an aggravated sexual assault, and defendant claimed that the sexual intercourse was consensual and therefore did not constitute the death eligibility factor of murder in the course of another felony, a witness's statement that defendant and the decedent were acting like "a couple for the night" was not sufficiently "material" to constitute a **Brady** violation. The court found that the evidence overwhelmingly showed that the intercourse was nonconsensual. Compare, [People v. Coleman, 183 Ill.2d 366, 701 N.E.2d 1063 \(1998\)](#) (substantial showing of a **Brady** violation was made by post-conviction petition alleging that the State: (1) knew that a witness's testimony was false, and (2) failed to disclose exculpatory statements made by the witness at a pretrial lineup; there was a reasonable likelihood that the verdict was affected where the witness's post-conviction affidavit called into question not only her own trial testimony but also that of police officers who claimed she identified defendant at the lineup).

[People v. Haynes, 192 Ill.2d 437, 737 N.E.2d 169 \(2000\)](#) To establish a Brady violation for the State's failure to disclose evidence that the defendant was unfit to stand trial, the defense must show a reasonable probability that the outcome of the fitness hearing would have been altered had the materials been disclosed. The defendant could not satisfy the materiality requirement where, instead of showing that defendant was a victim of "delusional" thinking, the undisclosed materials showed that he "is a methodical stalker and a calculating and ruthless killer." See also, [People v. Edwards, 195 Ill.2d 142, 745 N.E.2d 1212 \(2001\)](#) (no constitutional error occurred where the prosecutor presented hypnotically refreshed testimony at trial without disclosing the nature of that evidence to the defense; defendant failed to show what portion of the testimony had been affected by hypnosis, and any error would have been harmless in light of the overwhelming evidence of guilt).

[People v. Orange, 195 Ill.2d 437, 749 N.E.2d 932 \(2001\)](#) The State did not violate [Brady v. Maryland](#) by failing to disclose information regarding physical abuse of suspects at the police station where defendant was interrogated. The documents in question were not shown to have existed at the time of trial, and defendant failed to show that the underlying information had been available to the State. "We do not believe that . . . **Brady** requires the prosecution to disclose information about misconduct in unrelated cases known only to individual police officers where the nexus between the other cases of alleged abuse and the defendant's case was

not known until years later." See also, [People v. Mahaffey, 194 Ill.2d 154, 742 N.E.2d 251 \(2000\)](#), [People v. Simms, 192 Ill.2d 348, 736 N.E.2d 1092 \(2000\)](#), [People v. Ellis, 315 Ill.App.3d 1108, 735 N.E. 2d 736 \(1st Dist. 2000\)](#).

[People v. Hoble, 182 Ill.2d 404, 696 N.E.2d 313 \(1998\)](#) In determining materiality, the court must consider the cumulative effect of all suppressed evidence favorable to the defense, rather than the individual effect of each piece of evidence. **Brady** imposes a duty to disclose even evidence that is in the possession of police investigators and unknown to the prosecutor. A negative fingerprint report concerning a gas can which the State claimed defendant used to commit an arson, and the fact that a second gas can was found at the scene under circumstances supporting the defense claim that a second man started the fire, constituted favorable evidence which undermined the reliability of the jury's verdict. The court rejected the State's argument that under [Arizona v. Youngblood, 488 U.S. 51 \(1988\)](#), bad faith must be shown before the failure to disclose destroyed physical evidence constitutes a due process violation. The issue was whether the State failed to turn over favorable, material evidence under Brady; the subsequent destruction of the evidence was irrelevant.

[People v. Harris, 129 Ill.2d 123, 544 N.E.2d 357 \(1989\)](#) The prosecutor must disclose evidence that is "so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce" and "creates a reasonable doubt that did not otherwise exist." Undisclosed evidence will be considered material if its "suppression undermines confidence in the outcome of the trial" and there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." See also, [People v. Sims, 167 Ill. 2d 483, 658 N.E.2d 413 \(1995\)](#).

[People v. Schmidt, 56 Ill.2d 572, 309 N.E.2d 557 \(1974\)](#) Criminal discovery rules apply only to offenses that carry the possibility of imprisonment in the penitentiary. In misdemeanor cases, the State is required to only furnish a list of witnesses, any confessions, and evidence negating the defendant's guilt.

[People v. DeWitt, 78 Ill.2d 82, 397 N.E.2d 1385 \(1979\)](#) A defendant is not entitled to discovery at a probation revocation hearing.

[People v. Shukovsky, 128 Ill.2d 210, 538 N.E.2d 444 \(1988\)](#) A defendant may seek a pretrial subpoena to gather discoverable material without first filing a request for discovery.

[People v. Olinger, 112 Ill.2d 324, 493 N.E.2d 579 \(1986\)](#) The defendant and a co-defendant were convicted of three murders. A man named Anderson was an alternative suspect in the murders. At the hearing on post-trial motions, the defendant called a witness who testified that Anderson's wife claimed to have been present during the murders. The witness also testified that he had mentioned the wife's statements to the prosecutor and a police officer. The State disclosed the witness as someone they had talked to, but did not inform the defense of the substance of his revelations. The Court held that there was no discovery violation because the above evidence was not "material" and it could not have affected the outcome of the trial because the nondisclosed evidence was hearsay and would not have been admissible.

[In re C.J., 166 Ill.2d 264, 652 N.E.2d 315 \(1995\)](#) The respondent, a 12-year-old boy, was charged with delinquency based on allegations that he sexually abused his three-year-old

cousin. While the delinquency proceedings were pending, a DCFS investigation determined that the report of abuse was "unfounded." The minor's attorney subpoenaed the DCFS records concerning the "unfounded" report. The State produced no records under the subpoena and a DCFS official testified that the records had been expunged because the agency had never received a request that they be preserved. The trial court dismissed the delinquency petition on the ground that the State's failure to preserve the records denied due process. The Supreme Court reversed. The fact that a criminal prosecution may result from an investigation does not impute knowledge of all DCFS records to the prosecutor. DCFS is an agent of the prosecution only when it acts "at the behest of, and in tandem with, the State's Attorney" and with the intent to help in the prosecutorial effort. Moreover, because DCFS may find a report to be "unfounded" for many reasons, including reasons that have nothing to do with guilt or innocence, the evidence was at best "potentially exculpatory."

[People v. Weaver, 92 Ill.2d 545, 442 N.E.2d 255 \(1982\)](#) There are several possible sanctions for a discovery violation but the exclusion of evidence and a mistrial are extreme sanctions that are not favored where alternatives exist. The trial judge has discretion regarding the appropriate sanction to impose, but an abuse of discretion will be found when a defendant is prejudiced by a discovery violation and the judge fails to eliminate the prejudice. See also, [People v. Eyer, 133 Ill.2d 173, 549 N.E.2d 268 \(1989\)](#).

[People v. Newberry, 166 Ill.2d 310, 652 N.E.2d 288 \(1995\)](#) Supreme Court Rule 415 "confers broad power on the trial court to impose sanctions" for discovery violations including discretion to dismiss the charges as a sanction for the State's failure to comply with discovery.

[People v. Blackman, 359 Ill.App.3d 1013, 836 N.E.2d 101 \(1st Dist. 2005\)](#) Where defense counsel filed a discovery motion requesting, among other things, disclosure of any consideration paid to witnesses, the State erred by failing to disclose that a prosecution witness had been given \$20,000 for relocation expenses. Evidence of the payment was disclosed by the witness during her testimony at defendant's trial. A discovery violation does not necessarily require a new trial; the trial court may order further discovery, grant a continuance, exclude the evidence, or impose any other sanction that is justified under the circumstances. Where a delay in the proceedings would effectively protect the defendant from prejudice, a recess or continuance should be ordered. Here, the prejudice of the discovery violation could not have been cured by a mere continuance. The witness was important to the prosecution's case because she placed the defendant at the scene of the crime, and because she was more credible than a witness who gave similar testimony but who had been drinking alcohol and smoking marijuana at the time of the crime. Not only could defendant have used the information to impeach the witness and show that her testimony was biased, but he would have used timely disclosure in his pretrial investigation and in deciding whether to waive a jury.

[People v. Curry, 167 Ill.App.3d 146, 520 N.E.2d 984 \(2d Dist. 1988\)](#) A new trial was ordered where the State failed to disclose a medical report pertaining to the victim and a police report. Both documents corroborated defendant's version of the incident.

[People v. Collins, 333 Ill.App.3d 20, 775 N.E.2d 268 \(2d Dist. 2002\)](#) The trial court ordered the State to disclose an informant's prior record and any matters that went to credibility, but the State failed to disclose until trial that the informant had been working with police to avoid

having charges filed on another incident. The prosecutor denied that the informant had any agreement with police, even after the defense discovered that charges had not been filed on the other incident. The court rejected the argument that the defense suffered no prejudice because it discovered before trial that no charges had been filed with respect to the other incident. "Discovery is not a game of hide-and-seek; the State's pretrial chicanery impinged upon the integrity of the judicial system and requires reversal regardless of the weight of the other evidence."

[People v. James, 362 Ill.App.3d 250, 839 N.E.2d 1135 \(4th Dist. 2005\)](#) The court found that defense counsel has discretion whether to provide the defendant with the State's discovery, and that the defendant has no constitutional right to read discovery materials.

[People v. Johns, Overall & Chang, 336 Ill.App.3d 682, 784 N.E.2d 362 \(1st Dist. 2002\)](#) Three days after he was arrested for a drug offense, defendant Overall successfully moved for an order requiring the State to preserve police radio tapes of transmissions between 1½ hours before the arrest and 2½ hours afterward. The police department failed to produce the recordings and claimed that the tapes had been erased and reused. Where the trial court specifically orders that materials be preserved, but those materials are destroyed by police, no showing of bad faith is required to justify exclusion of testimony by State witnesses. The court also noted that defendant had made a prompt request for preservation, and there was no argument that the tapes had been destroyed before the judge ordered their preservation.

[People v. Savage, 361 Ill.App.3d 750, 838 N.E.2d 247 \(4th Dist. 2005\)](#) Supreme Court Rule 415(c) provides that materials "furnished to an attorney" pursuant to discovery rules "shall remain in his exclusive custody and be used only for the purposes of conducting his side of the case, and shall be subject to such other terms and conditions as the court may provide." Before his trial, defendant filed a motion for relief from prosecutorial misconduct. The motion alleged that Macon County jail officials, pursuant to directions from the State's Attorney's office, conducted a "shakedown" to confiscate discovery materials which had been provided to the inmates by their defense attorneys. The court rejected defendant's argument that Rule 415(c) violates equal protection because there is no rational basis for prohibiting possession of discovery materials by incarcerated defendants but allowing possession by defendants who are able to post bond or who represent themselves. It was not unreasonable for the drafters of Rule 415(c) to conclude that in most cases in which discovery rules apply, defendants would be represented by counsel, and that regulation of discovery materials by attorneys would further the purpose of protecting these materials from public availability.

[People v. Torres, 305 Ill.App.3d 679, 712 N.E.2d 835 \(2d Dist. 1999\)](#) The prosecution violated [Brady v. Maryland](#) by failing to disclose that two of the identification witnesses had received promises of leniency in exchange for their testimony.

[In re E.V., 298 Ill.App.3d 951, 700 N.E.2d 175 \(1st Dist. 1998\)](#) The State did not violate [Brady v. Maryland](#), by failing to disclose internal police memoranda indicating that defendant was a suspect in another crime. A **Brady** violation occurs only where nondisclosed evidence is favorable to the defendant.

[People v. Coleman, 307 Ill.App.3d 930, 718 N.E.2d 1074 \(2d Dist. 1999\)](#) Under [People v. Newberry, 166 Ill.2d 310, 652 N.E.2d 288 \(1995\)](#), due process is violated where the State

destroys evidence after the defense files a timely discovery motion seeking its preservation, even if the defense cannot show that the evidence had exculpatory value. "[A]ppropriate sanctions" may be imposed even if the destruction was inadvertent; in other words, the defense need not establish that the evidence was destroyed in bad faith. Here, due process was violated by the State's failure to preserve an alleged controlled substance after defendant filed a timely discovery motion.

[People v. Garcia, 312 Ill.App.3d 422, 727 N.E.2d 683 \(2d Dist. 2000\)](#) A party's failure to comply with discovery requirements may warrant exclusion of the evidence even where there is no showing of bad faith. See also, [People v. Leon, 306 Ill.App.3d 707, 713 N.E.2d 1258 \(2d Dist. 1999\)](#) (no error in prohibiting the prosecution from eliciting testimony based on undisclosed evidence. The State failed to establish how it would be prejudiced and there "would be little purpose in having the sanction of exclusion available and then not allow courts to employ it in appropriate cases").

[People v. Pogue, 312 Ill.App.3d 719, 724 N.E.2d 525 \(1st Dist. 1999\)](#) The court criticized "two trial tactics" of the prosecutor concerning discovery. In response to a defense request for an updated criminal history on one of the State's witnesses, the prosecutor placed the update on the State's table in the courtroom but did not hand the document to defense counsel or place it in a conspicuous place on the defense table. The court stated, "We find the State's method of tender suspect and contrary to the spirit of Supreme Court Rules governing discovery in criminal cases." The prosecutor also elicited testimony from an Assistant State's Attorney about an oral statement made by the defendant but not disclosed to defense counsel under Supreme Court Rule 412(a).

[People v. Damico, 309 Ill.App.3d 203, 722 N.E.2d 194 \(2d Dist. 1999\)](#) The trial judge erred by striking a third party's confession to the crime as a sanction for a discovery violation. The Appellate Court held that exclusion of evidence should be reserved for the most extreme discovery violations, and will be closely scrutinized on appeal because courts cannot ignore the fundamental character of a defendant's right to a fair trial. Where there was no reason to believe that the failure to disclose was intended to gain an advantage at trial, counsel learned of the confession only a few days before trial and the witness was listed on defendant's discovery answers, the trial court abused its discretion by excluding the evidence. A delay to allow the prosecutor to interview the witness would have permitted the State to perform the same cross-examination as if the statement had been disclosed, without hindering defendant's right to present a defense. See also, [People v. Houser, 305 Ill.App.3d 384, 712 N.E.2d 355 \(4th Dist. 1999\)](#) (trial judge erred by excluding the affirmative defense of necessity as a sanction for defense counsel's failure to comply with discovery rules).

[People v. Mitts, 327 Ill.App.3d 1, 762 N.E.2d 590 \(1st Dist. 2001\)](#) The State committed reversible error by failing to inform the defendant, before trial, that one of three sexual assault complainants had consensual intercourse two or three days before the alleged attack. The court concluded that the violation prejudiced the defense because a DNA sample of the complainant's boyfriend might have indicated that defendant had not attacked her, and in view of the State's theory of the case raised doubt that he was involved in any of the offenses. In addition the defendant's failure to request a continuance does not waive an objection to a discovery violation if a mere continuance would be insufficient to cure the prejudice.

[People v. Gray, 247 Ill.App.3d 133, 617 N.E.2d 217 \(1st Dist. 1993\)](#) The defendant was convicted of three murders. After trial, he filed a ¶2-1401 petition alleging that Villagomez, a defense witness, had committed perjury. Villagomez alleged that he had told prosecutors before trial that he had not seen defendant at the scene of the offenses. However, at trial, Villagomez agreed to the prosecutor's leading question which asserted that he had seen defendant in the area immediately before the shootings. The witness also alleged that he had been told not to inform defense counsel that he had spoken to prosecutors. Villagomez claimed that he had complied with this request because he was afraid criminal charges might be filed against him. The Court found that the prosecution violated its duty to correct false testimony and to disclose evidence favorable to the defense. Because Villagomez had told the prosecutors that he had not seen defendant at the time of the shooting, it was improper for the prosecutor to ask a leading question which asserted that defendant had been at the scene of the crimes. Once Villagomez gave an answer which conflicted with what he had told prosecutors before trial, the State had a duty to correct the misimpression.

[People v. Sharrod, 271 Ill.App.3d 684, 648 N.E.2d 1141 \(1st Dist. 1995\)](#) The State violated **Brady** and Supreme Court Rule 412(c) when it failed to disclose that the complainant was on juvenile supervision when he first identified defendant as a participant in the crime. The State is required to disclose any evidence that tends to negate the defendant's guilt, including any basis on which the witness might hope to obtain lenient treatment from the prosecution.

[People v. Forsythe, 84 Ill.App.3d 643, 406 N.E.2d 58 \(1st Dist. 1980\)](#) The trial judge dismissed the indictment as a sanction for the State's failure to disclose the identity of the informant. The Court agreed that the State was required to identify the informant, but reversed the dismissal because the trial judge failed to consider other sanctions such as a continuance.

[People v. Koutsakis, 255 Ill.App.3d 306, 627 N.E.2d 388 \(3d Dist. 1993\)](#) The Court rejected the State's argument that discovery sanctions should be imposed only where the prosecution acts in bad faith. Supreme Court Rule 415(g) authorizes an array of sanctions for discovery violations, without regard to whether the violation occurred in bad faith.

[People v. Stack, 261 Ill.App.3d 191, 633 N.E.2d 42 \(4th Dist. 1994\)](#) Reversible error occurred where the trial court erroneously believed that it was required to bar defendant's self-defense claim as a sanction for a discovery violation. A trial judge may respond to a discovery violation by permitting discovery of the information, granting a continuance, excluding the evidence, or entering "such other order as it deems just under the circumstances." The judge's statement that he was "required" to exclude the evidence established that he failed to appreciate that he had discretion to permit defendant to raise the claim.

[People v. Heinzman and Potter, 232 Ill.App.3d 557, 597 N.E.2d 942 \(5th Dist. 1992\)](#) At a trial for felony theft for stealing pigs, a mistrial was declared because the State failed to disclose all documents in its possession concerning the sale of the pigs. The judge directed the State to insure that discovery was complete before retrial. At the second trial, the State's first witness, a man named Nelson, claimed that he and defendants had been accomplices in the theft. During Nelson's testimony, defendants learned for the first time that the State had failed to disclose a written statement he had given to police. The trial court dismissed the charges. The Appellate Court held that although the violation was inadvertent and unintentional, the trial court did not abuse its discretion. Nelson was a key witness who, although he claimed to have been involved in the offense, was not charged. The statement was

critical because it contained several inconsistencies and revealed the name of a potential defense witness. Most significantly, the earlier mistrial had been caused by the State's discovery violation, and there was a specific order that the prosecution was to make certain that discovery was completed before the second trial.

[People v. Seesengood, 266 Ill.App.3d 351, 639 N.E.2d 959 \(4th Dist. 1994\)](#) Defense counsel moved for the imposition of sanctions against the State for its failure to make pretrial disclosure that police had tape recorded an interview with an alleged accomplice who testified for the State. The Court held that sanctions can be imposed against an attorney who has violated a discovery order only if the violation is wilful and here the record showed that the prosecutor did not know of the recording until trial, and informed defense counsel when it was discovered.

[People v. Nohren, 283 Ill.App.3d 753, 670 N.E.2d 1208 \(4th Dist. 1996\)](#) As part of the duty to investigate criminal activity, a prosecutor is authorized to issue a subpoena duces tecum without regard to whether a criminal charge is pending. The Court concluded that if "the State's Attorney did not have such investigative power, it would lead to the perverse result that the State must formally charge an individual prior to investigating the factual basis for the charge."

Cumulative Digest Case Summaries §15-1

[People v. Kladis, 2011 IL 110920 \(No. 110920, 12/30/11\)](#)

1. In [People v. Schmidt, 56 Ill.2d 572, 309 N.E.2d 557 \(1974\)](#), the court addressed the scope of discovery in a misdemeanor DUI case. It held that the State was statutorily required to furnish the defendant with a list of witnesses, any confession of the defendant, and the results of the breathalyzer test, as well as any evidence negating the defendant's guilt as required by [Brady v. Maryland, 373 U.S. 83 \(1963\)](#), and the DUI arrest report for use at trial to impeach the witness who prepared it.

Schmidt determined the scope of discovery by considering relevant decisions, statutes, custom, and practice as it existed in 1974. **Schmidt** did not create a rigid list of discoverable items that remains static and does not take into account fundamental changes occurring in law and society since that ruling. Rather, pretrial discovery presupposes a range of relevance and materiality that includes not only what is admissible at trial, but also that which leads to what is admissible.

Since [Schmidt](#), video recordings made by in-squad cameras in misdemeanor DUI cases have become as relevant to the issue of proving or disproving guilt as the materials delineated in [Schmidt](#). Use of video recordings as evidence at trial has become common and courts increasingly rely on video recordings to present an objective view of the facts in a case. Allowing their discovery furthers the objectives of discovery of enhancing the truth-seeking process, enabling attorneys to better prepare for trial, eliminating surprise, and promoting an expeditious and final determination of controversies in accordance with the substantive rights of parties.

Supporting the conclusion that video recordings are discoverable under **Schmidt** are recent legislative enactments. Illinois State Police squad cars are required to be equipped with both video and audio recording equipment, and such recordings must be stored for a period of

90 days before being destroyed. [20 ILCS 2610/30\(b\) and \(f\)](#). There is also a general requirement that all in-squad recordings made for a law-enforcement or investigative purpose be retained for a minimum of 90 days. If the recordings are made as part of an arrest and are evidence in any criminal, civil, or administrative proceeding, they cannot be destroyed except upon a final disposition and an order from the court. [720 ILCS 5/14-4\(h-15\)](#).

Therefore, under **Schmidt**, video recordings are discoverable in misdemeanor cases. When the State received written notice from the defendant five days after her arrest requesting production of the recording of her police encounter, filed in a civil summary suspension proceeding, the State should have taken appropriate steps to ensure that it was preserved.

2. The correct sanction to be applied for a discovery violation is a decision appropriately left to the discretion of the trial court, and its judgment shall be given great weight. An abuse of discretion exists only where the decision of the trial court is fanciful, arbitrary, or unreasonable to the degree that no reasonable person would take the view adopted by the trial court.

Because the State took no immediate action on defendant's request for the recording, the recording was automatically purged per police departmental policy within 30 days of the arrest. As a sanction for failing to preserve the recording, the court barred the police officer from testifying to any of the events captured on the videotape. The video system began recording five seconds prior to activation of the squad car's emergency lights, and ended when the officer turned off his emergency lights prior to transporting defendant to the station. This sanction was narrowly tailored to bar the State from introducing testimony regarding what was contained in the video recording, and allowed the officer to testify to any observations of defendant prior to the start of the recording and after its end. The sanction was not disproportionate to the violation and did not constitute an abuse of the court's discretion.

[People v. Baker, 2015 IL App \(5th\) 110492 \(No. 5-11-0492, 2/6/15\)](#)

Under [Illinois Supreme Court Rule 415](#), evidence may be excluded as a sanction for a discovery violation. Factors to be considered in determining whether to exclude evidence include the effectiveness of a less severe sanction, the materiality of the witness's proposed testimony to the outcome of the case, any prejudice to the opposing party, and any evidence of bad faith. The imposition of a sanction for a discovery violation is reviewed under the abuse of discretion standard.

Where the defense produced an expert witness's revised report two days before jury selection was to commence, and the report contained statistical information which had not been disclosed previously, the trial court did not abuse its discretion by excluding the expert from testifying. Noting that the defense failed to make an offer of proof and that it was difficult to determine the value of the statistical evidence, the court stressed that the State indicated it would need additional time to prepare for cross-examination, 120 prospective jurors had been summoned to report in two days, and witnesses had been subpoenaed. In addition, the trial had previously been continued due to a last-minute decision by the defense team to present an insanity defense and defendant failed to establish that he was unfairly prejudiced by the exclusion of the expert's testimony. Under these circumstances, the trial court did not abuse its discretion by prohibiting the testimony.

(Defendant was represented by Assistant Deputy Defender Amanda Horner, Mt. Vernon.)

[People v. Carballido, 2011 IL App \(2d\) 090340 \(No. 2-09-0340, mod. op., 8/10/11\)](#)

The court held that a post-conviction petition alleged the gist of a constitutional issue concerning a State investigator's failure to disclose field notes of his interview of a defense witness. The court noted that the failure to disclose material evidence after a defense request might violate due process. The witness testified at defendant's trial, and was impeached by the officer's testimony. Supreme Court Rule 412 requires the prosecution to insure a flow of information between various investigative personnel, so that the prosecutor obtains all information relevant to the case. Furthermore, [725 ILCS 5/114-13\(b\)](#) requires an investigating officer to provide the prosecutor with all investigative material, including field notes. Because the impeachment was on a critical point, and because the witness's testimony and the officer's impeachment were confusing concerning the precise content of the witness's out-of-court statement, the court directed the State to ensure that discovery requirements were completed before any proceedings occurred on remand.

(Defendant was represented by Assistant Defender Mike Vonnahmen, Springfield.)

[People v. Carballido](#), ___ Ill.App.3d ___, ___ N.E.2d ___ (2d Dist. 2011) (No. 2-09-0340, 3/17/11)

The court held that a post-conviction petition alleged the gist of a constitutional issue concerning a State investigator's failure to disclose field notes of his interview of a defense witness. The court noted that the failure to disclose material evidence after a defense request might violate due process. The witness testified at defendant's trial, and was impeached by the officer's testimony.

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(Defendant was represented by Assistant Defender Mike Vonnahmen, Springfield.)

[People v. Coleman](#), 2012 IL App (4th) 110463 (No. 4-11-0463, 12/24/12)

Defendant filed a post-conviction petition raising several claims, including that the State committed a **Brady** violation by failing to disclose to the defense that police officers tested only one of the 15 bags of white powder found at the scene of the arrest before emptying all the bags into one large bag for testing by the crime lab. The trial court summarily dismissed the petition as frivolous and patently without merit.

The court found that the petition made an arguable **Brady** claim. Due process requires the State to disclose evidence that is favorable to the accused and material to either guilt or innocence. Evidence is material if there is a reasonable probability that had it been disclosed, the result of the proceeding would have been different. **Brady** evidence must be disclosed in adequate time to allow the defense to use the favorable material effectively in the preparation or presentation of its case.

The petition, supported by defendant's affidavit, alleged that the State did not inform the defense that a police officer had commingled 15 bags of white powder into one large bag after testing only one of the smaller bags. The record did not contradict this claim, because at trial both attorneys spoke of the commingling as a surprise to the defense. Under these circumstances, the **Brady** claim was arguable and therefore sufficient to survive first stage

dismissal.

(Defendant was represented by Assistant Defender Allen Andrews, Springfield.)

[People v. Escareno, 2013 IL App \(3d\) 110152 \(No. 3-11-0152, 1/8/13\)](#)

The State is obligated to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment. It follows, therefore, that a defendant has a limited right to examine otherwise statutorily-privileged information if the evidence is relevant and material, and its relevance is not outweighed by other factors.

The defendant's right to discover favorable evidence does not include the unsupervised authority to search through the State's files. If the defendant requests information that is privileged, due process requires that the court determine whether the information is material by an *in camera* review. If the court's review determines that the information contained within the file is material, the court must turn that information over to the defendant.

Defendant subpoenaed all records and statements made by witnesses pertaining to a DCFS investigation against him. DCFS refused to release the information to the defendant because it was contained in a report of an allegation found to be unfounded, and thus by statute was privileged. It was error for the court to grant the State's motion to quash the subpoena without first conducting an *in camera* review of the records to determine if any material information was contained in the records.

The cause was remanded for an *in camera* review. If the court determines that material information is present, defendant should be granted a new trial.

(Defendant was represented by Assistant Defender Jay Wiegman, Ottawa.)

[People v. Graham, 406 Ill.App.3d 1183, 947 N.E.2d 294 \(5th Dist. 2011\)](#)

Evidence of a witness's mental condition is admissible to the extent that it bears on the credibility of the witness and is thus a permissible area for impeachment. When the defense seeks discovery of mental health records for this purpose, a two-step procedure must be followed. First, defendant must sufficiently show that the requested records are material and relevant to the witness's credibility. This requirement is not satisfied merely by a showing of need, nor can the defense be excused from this requirement on the ground that he cannot make the requisite showing without access to the records. Once this is done, the records are discoverable, but must be examined by the trial court *in camera* if the witness claims or asserts his or her statutory privilege. The trial court has broad discretion in ruling on issues of relevance and materiality.

The trial court did not abuse its discretion in denying defendant's request for the mental health records of his minor daughter whom he was accused of sexually assaulting. He failed to establish that the records were material and relevant to her credibility. The State's position was that the daughter's need for psychiatric treatment and medication was a consequence of her victimization. The defense asserted that the daughter had shown signs of mental illness before coming into contact with defendant, but never specified what those signs were or how they might affect her credibility, other than stating that defendant's wife had problems controlling her. The defense did not contend that she suffered from delusions or from a condition that would cause her to pathologically lie. Therefore the court had no reason to believe that the mental health records would provide the defense with a source of impeaching information not available from other sources.

(Defendant was represented by Assistant Defender John Gleason, Mt. Vernon.)

[People v. Gray, 2016 IL App \(2d\) 140002 \(No. 2-14-0002, 3/2/16\)](#)

In [United States v. Ruiz, 536 U.S. 622 \(2002\)](#), the Supreme Court held that the State was not required to disclose material impeachment evidence before entering a plea agreement with a defendant.

Here defendant entered a fully negotiated guilty plea. He later filed a post-conviction petition alleging that he agreed to plead guilty primarily because he feared a trier of fact would believe the State's three key witnesses. Later, he learned that all three witnesses had been indicted on criminal charges. Defendant contended that he could have used this information to impeach the witnesses at trial. The State, however, failed to disclose this evidence prior to his guilty plea. If defendant had been aware of these charges, he would not have pleaded guilty.

The Appellate Court held that under **Ruiz**, the State had no obligation to disclose this potential impeachment evidence before defendant pled guilty. The evidence could have been used for impeachment only and was not otherwise exculpatory.

(Defendant was represented by Assistant Defender Fletcher Hamill, Elgin)

[People v. Moises, 2015 IL App \(3d\) 140577 \(No. 3-14-0577, 8/24/15\)](#)

1. [20 ILCS 2610/30\(e\)](#) provides that a stop resulting from a suspected violation of certain provisions of the Illinois Vehicle Code "shall be video and audio recorded." The recordings are required to be maintained for at least 90 days.

The trial judge found that by ordering defendant to perform field sobriety tests in an area that could not be seen by the camera, the officers engaged in the equivalent of destroying or losing the videotape on which a field sobriety test was recorded. The judge imposed a discovery sanction prohibiting deputies from testifying about any part of the traffic stop where the arresting officer took defendant off-camera, including the field sobriety tests.

The Appellate Court held that the trial court erred by entering the sanction order. First, no discovery violation occurred where the State disclosed the videotape from the traffic stop in response to defendant's request. The court rejected the argument that the failure to record a traffic stop is the equivalent of destroying a tape after it is made.

Second, the police are not required to conduct field sobriety tests within view of a squad car camera. The majority opinion noted that protecting the safety of both the officer and the driver may require that field sobriety testing be conducted away from the camera.

The trial court's sanction order against the State was reversed and the cause remanded for further proceedings.

2. In a concurring opinion, Justice Lytton noted that even the prosecutor "lamented" that the reasons for conducting the field testing outside the camera view were unknown. Because the record did not disclose whether the officer's reasons for conducting the field sobriety tests out of the camera's view were sufficient to overcome the legislature's intent that video and audio must be captured during traffic stops, Justice Lytton would have remanded the cause for a hearing to consider any reasons offered by the State for conducting the sobriety testing outside the view of the camera.

3. In dissent, Justice Holdridge stated that the legislative intent of §30(e) is to require that traffic stops be recorded, in order to provide objective evidence of the incident and thereby assist in the truth-seeking process. Because such legislative intent is thwarted where a police officer fails to make the recording, Justice Holdridge would hold that the trial court did not abuse its discretion by ordering discovery sanctions.

[People v. Moore, 2016 IL App \(1st\) 133814 \(No. 1-13-3814, 2/18/16\)](#)

1. At defendant's trial, the State introduced the testimony of two witnesses who

identified defendant in court. Both witnesses also viewed separate photo arrays. One picked defendant out of the array, while the other did not. By the time of trial, both arrays had been lost or destroyed, although there was no evidence the State had acted in bad faith by failing to preserve this evidence.

On appeal, defendant argued that he was denied his right to due process where the State had failed to preserve the photo arrays. The court disagreed, holding that since there was no evidence that the State had acted in bad faith and no evidence that the missing evidence would have been inherently exculpatory, defendant was not denied due process.

2. In [Arizona v. Youngblood](#), 488 U.S. 51 (1988), the Supreme Court held that it is not necessarily a due process violation when the State fails to preserve evidence. When the missing evidence is not inherently exculpatory but is only potentially useful, the defendant must show the State acted in bad faith to establish a due process violation.

In [People v. Newberry](#), 166 Ill. 2d 310 (1995), the Illinois Supreme Court held that the defendant did not need to show bad faith on the part of the State to establish a due process violation where defendant has made a discovery request and the destroyed evidence was essential to the outcome of the case.

In [Illinois v. Fisher](#), 540 U.S. 544 (2004), the Supreme Court expressly disagreed with the reasoning in [Newberry](#), and re-affirmed that to establish a due process violation, the defendant must show that the State acted in bad faith, even if the defendant has made a discovery request and even if the destroyed evidence was essential to the outcome of the case. The only exception to the bad-faith requirement is where the evidence is materially exculpatory rather than simply potentially useful.

The Appellate Court noted that the Illinois Supreme Court had not yet addressed whether the holding in [Fisher](#) affected a due process analysis under the Illinois Constitution. But it agreed with previous Appellate Court decisions holding that there was no indication the Illinois Supreme Court intended to interpret the Illinois due process clause more broadly than the federal clause. Accordingly, **Fisher** was the controlling authority.

3. Here the photo arrays were only potentially useful, not materially exculpatory. And there was no evidence the State acted in bad faith by not preserving the evidence. Thus under **Fisher**, defendant could not show a due process violation.

[People v. Nunn](#), 2014 IL App (3rd) 120614 (No. 3-12-0614, 10/31/14)

1. Due process requires that criminal defendants have a meaningful opportunity to present a complete defense. The trial court has inherent authority to dismiss charges where the failure to do so would result in the deprivation of due process. The denial of a motion to dismiss is reviewed for abuse of discretion.

Where law enforcement destroys or fails to preserve potentially useful evidence, due process is violated only if the defendant can demonstrate bad faith. When determining whether due process has been violated, courts should consider the degree of bad faith or negligence and the importance of the lost evidence compared to the evidence that was introduced at trial. “Bad faith” implies “a furtive design, dishonesty or ill will.”

Whether police violated a duty to preserve evidence depends on whether they acted in good faith and according to normal practice, whether the evidence was significant in defendant’s defense, and whether the evidence was of such character that comparable evidence could not have been obtained by reasonable and available means.

2. While officers were arresting defendant on charges of aggravated battery of a peace officer and resisting arrest, several bystanders took video and still photographs on their cell phones. Several of the bystanders testified that they were told by officers they would go to jail

unless they stopped recording the incident and erased the recordings they had already made. One of the officers testified that he believed the officers had authority to seize the phones, but that they lacked the manpower to do so. The trial court denied a motion to dismiss the charges due to a due process violation, finding that police did not act in bad faith by ordering the destruction of the videos or by failing to preserve them as evidence.

The Appellate Court reversed, finding that the officers acted in bad faith by ordering the bystanders to delete the recordings despite knowing that the bystanders were legally permitted to record the event and that the officers could seize the phones to preserve the videos for use as evidence. The court noted that even if the officers were correct that they lacked sufficient manpower to seize the phones, they were not justified in demanding that the bystanders delete the videos. Furthermore, even if the officers lacked sufficient manpower to seize the phones at the scene, they could have asked the bystanders to bring their phones to the police station after the arrest.

Because the recordings would have been material to defendant's guilt or innocence in that they would have captured the actions of both defendant and the police, and because no comparable evidence was available, the court concluded that defendant was denied her due process right to a fair trial. The convictions were reversed.

(Defendant was represented by Assistant Defender Kerry Bryson, Ottawa.)

[People v. Peterson, 397 Ill.App.3d 1048, 923 N.E.2d 890 \(3d Dist. 2010\)](#)

1. A claim of vindictive prosecution is not a defense on the merits of a charge, but an independent assertion that the prosecution has been brought for improper reasons. The remedy for a claim of prosecutorial vindictiveness is pretrial dismissal of the case, which terminates the proceeding without any consideration of guilt or innocence.

A claim of vindictive prosecution does not qualify as an affirmative defense which is subject to mandatory pretrial discovery under Supreme Court Rule 412. Thus, a defendant who raises a claim of prosecutorial vindictiveness is not entitled to mandatory pretrial disclosure of all documents relating to the decision to charge him.

2. Even if vindictive prosecution is not an affirmative defense subject to mandatory discovery rules, Supreme Court Rule 412(h) provides discretion to the trial court to order the disclosure of information that is material to a defense. Because a defendant is entitled to a hearing on a claim of selective or vindictive prosecution only if he shows a colorable claim that the government acted improperly in prosecuting him, and in granting the defendant's motion for limited discovery the trial court stated that there was no evidence the State acted improperly in its charging decision, the discovery request did not seek evidence that was material to a viable defense. Under these circumstances, the trial court erred by ordering discretionary discovery.

3. The defendant lacked authority to cross-appeal from the State's interlocutory appeal under Supreme Court Rule 604(d). (See **APPEAL**, §2-6(a)).

[People v. Porter-Boens, 2013 IL App \(1st\) 111074 \(No. 1-11-1074, 9/5/13\)](#)

When confidential records are sought in discovery, the trial court should review the records *in camera* and use its discretion to disclose only material information. The trial court has broad discretion in ruling on issues of relevance and materiality and its determination will not be disturbed absent an abuse of discretion. A court abuses its discretion if its decision rests on an error of law.

Prior allegations of misconduct by a police officer may be admitted to prove intent, plan, motive, or a course of conduct of the officer, or to impeach an officer as a witness based on bias, interest, or motive to falsify. In determining the admissibility of prior allegations of

misconduct, the trial court should consider the temporal proximity of the past misconduct, the similarity of the past misconduct to the conduct at issue, and whether there is a repetition of similar misconduct. The trial court may properly exclude evidence of prior allegations if the officer did not receive discipline from his department. A single incident years removed from the event at issue has little relevance, but a series of incidents spanning several years can be relevant to establishing a claim of a pattern and practice.

The trial court properly applied these standards in conducting an *in camera* inspection of records that the defense subpoenaed from the Independent Police Review Authority. The trial court did not abuse its discretion in determining that it would limit disclosure allegations of police misconduct occurring within three years of the charged offense, or in refusing to disclose allegations determined to be unfounded or not sustained, as mere allegations of misconduct are not probative. Moreover, none of the allegations of misconduct were similar to those made in defendant's case, nor did they involve similar incidents spanning several years.

(Defendant was represented by Assistant Defender Todd McHenry, Chicago.)

[People v. Shores, 2012 IL App \(5th\) 100196 \(No. 5-10-0196, 9/4/12\)](#)

Supreme Court Rule 415(c) provides that any materials furnished to an attorney in discovery "shall remain in his exclusive custody and be used only for the purposes of conducting his side of the case, and shall be subject to such other terms and conditions as the court may provide." The committee comments to the rule indicate that the purpose of the rule is to prevent discovery materials from becoming publicly available, so as to prejudice the administration of criminal justice. The comments acknowledge that counsel will undoubtedly have to show or at least discuss the materials with others, but counsel is not permitted to furnish others with copies or allow them to take the materials from his office.

The Appellate Court rejected defendant's argument that he was denied his constitutional rights when he was not provided copies of the discovery materials. Defendant was permitted to review the materials in the presence of his attorney and was unable to identify any item that he was not able to adequately review or explain how his defense would have differed had he had a personal copy of the materials.

The Appellate Court did, however, express concern that the rule placed an undue restriction on defense counsel's ability to prepare an adequate defense if he was unable to share the discovery materials with others such as the defendant, investigators, experts, or consultants. It noted that Rule 451(c) was modeled after the ABA Standards, which have since eliminated the requirement that discovery materials remain in the exclusive custody of the attorney, recognizing that the restriction unduly hampers the attorney's ability to prepare the case. Other states have also adopted other less burdensome means to protect information contained in discovery materials and have given attorneys more flexibility. While the Appellate Court agreed that "Rule 415(c) is unduly burdensome on defense counsel's duty to prepare an adequate defense and that there are better alternatives for protecting the information contained in discovery materials," it noted that any "changes in supreme court rules are subject to a committee review and supreme court passage, not to this court."

(Defendant was represented by Assistant Defender Larry Wells, Mt. Vernon.)

[People v. Voltaire, 406 Ill.App.3d 179, 941 N.E.2d 270 \(2d Dist. 2010\)](#)

In [Arizona v. Youngblood, 488 U.S. 51 \(1988\)](#), the United States Supreme Court found that in the absence of bad faith, due process does not require dismissal of criminal charges

where the State destroyed evidence which could have been subjected to “potentially useful” testing. In [People v. Newberry, 166 Ill.2d 310, 652 N.E.2d 288 \(1995\)](#), however, the Illinois Supreme Court departed from **Youngblood** and concluded that where evidence was outcome - determinative, such as the suspected narcotic in a controlled substances prosecution, the charge should be dismissed even if the State did not act in bad faith. The **Newberry** court stressed that the defendant had no realistic hope of exonerating himself of a controlled substance violation if he was unable to have the substance tested by his own expert.

Here, the trial court dismissed controlled substances charges under **Newberry** after finding that the State had inadvertently destroyed suspected controlled substances upon the completion of a co-defendant’s case.

1. The Appellate Court concluded that **Newberry** was based on federal constitutional law, as it did not specifically mention the Illinois Constitution. In addition, although Supreme Court Rule 415(g) authorizes the trial court to dismiss a charge as a sanction for a discovery violation, the trial court exercised its discretion here by expressly declining to impose any discovery sanction.

2. The Appellate Court found that if presented with the issue today, the Illinois Supreme Court would abandon **Newberry** in light of [Illinois v. Fisher, 540 U.S. 544, 124 S.Ct. 1200, 157 L.Ed.2d 1060 \(2004\)](#). (Agreeing with [People v. Kizer, 365 Ill.App.3d 949, 851 N.E.2d 266 \(4th Dist. 2006\)](#)). In **Fisher**, the Supreme Court clarified that a suspected controlled substance is at most “potentially useful evidence” to which the **Youngblood** rule applies. Thus, under the current state of the law the Illinois Supreme Court would hold that the inadvertent destruction of controlled substances does not require dismissal of the charges.

The trial court’s order dismissing the charges was reversed and the cause remanded for further proceedings.

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§15-2

Statements of the Defendant

[People v. Weaver, 92 Ill.2d 545, 442 N.E.2d 255 \(1982\)](#) The defendant was charged with the murder of her husband. A State witness testified about a statement in which defendant said she had an affair with a third party. Defense counsel asked that the testimony be stricken, or a mistrial granted, because the State had not disclosed the statement. Because the statement was prejudicial, the trial judge was required to exclude it or grant a mistrial.

[People v. Morgan, 112 Ill.2d 111, 492 N.E.2d 1303 \(1986\)](#) At defendant's trial for murder, a State witness testified defendant placed a pillow over the muzzle of the gun and said, "[T]his is what Jews and Italians do when they want to snuff somebody out." This statement had not been included in the discovery material produced by the State. Though the trial court found that the statement should have been produced, it merely instructed the jury to disregard. The Supreme Court affirmed. The appropriate sanction for a discovery violation is left to the trial judge's discretion. Whether a new trial is warranted depends on several factors, including the strength of the State's evidence and the importance of the undisclosed statement. Here, the statement did not bear on defendant's guilt, and the evidence was not "so close" or the prejudice "so strong" as to require a new trial.

[People v. Hendricks, 325 Ill.App.3d 1097, 759 N.E.2d 52 \(1st Dist. 2001\)](#) Supreme Court Rule 412 requires the State, upon written motion of the defense, to disclose written or recorded statements by the defendant and the substance of any alleged oral statements. In deciding whether the defense was prejudiced by the failure to disclose statements, the court must consider the closeness of the evidence, the strength of the undisclosed evidence, the likelihood that prior notice could have helped the defense discredit the evidence, and whether the failure to disclose the evidence was wilful. A new trial was required where the evidence of guilt was close, the undisclosed statement was the only evidence to show that defendant "knowingly" possessed a controlled substance, defendant disputed that the alleged statement occurred, and timely disclosure would have helped the defense discredit the evidence. Defense counsel did not waive the error by declining the trial court's offer of a continuance; "the damage had already been done by the time defendant learned of the statement," and "a continuance would not have been an adequate remedy."

[People v. Mathews, 299 Ill.App.3d 914, 702 N.E.2d 291 \(1st Dist. 1998\)](#) The State was allowed to introduce a statement by the defendant that had not been disclosed to the defense. Upon written motion by the defense, the State must disclose any written or recorded statement by the defendant and the substance of any oral statement. The duty to disclose continues and requires prompt notification to the defense when additional information is discovered during trial. Defendant was prejudiced by the discovery violation. First, the evidence was close. Second, the undisclosed statement provided strong evidence of motive, an important part of a case in which the defendant was accused of shooting a person he did not know, and constituted strong corroboration of testimony identifying defendant as the shooter. Timely disclosure would have allowed the defense to move to suppress the statement or attempt to discredit or explain it; because the defense had no notice of the statement, it was unable to modify its trial strategy to lessen the impact of the statement.

[People v. Orr, 149 Ill.App.3d 348, 500 N.E.2d 665 \(1st Dist. 1986\)](#) At defendant's trial for arson, the complainant's daughter (Gloria) testified that a few days before the incident she and defendant had an argument, and defendant stated that he was going to burn her mother's house. The defense moved for mistrial on the ground that defendant's alleged statement had not been disclosed. The prosecutor responded that all police reports had been tendered, the State was under no obligation to reduce statements to writing, and Gloria could have been interviewed prior to trial. Rule 412 requires the State to disclose the "substance of any oral statements made by the accused" and a "list of witnesses to the making and acknowledgment of such statements." This rule is not limited to formal statements made to the authorities, but encompasses any "statements made to anyone that might have bearing on the defendant's guilt or innocence." Because the defendant's alleged statement to Gloria was a direct threat to commit the offense charged, it had a bearing on guilt and should have been disclosed. The State did not comply with its discovery obligation by furnishing the defense with the police reports. The pertinent statement was not contained in the police reports - the closest reference was that Gloria felt the fire occurred because defendant was trying to get even with her. This general statement was not sufficient to disclose the alleged specific threat. Although the State is not required to reduce oral statements to writing, Rule 412 does require it "to disclose both the substance of the defendant's oral statement and a list of witnesses thereto." Conviction reversed.

[People v. Agyei & Agyei, 232 Ill.App.3d 546, 597 N.E.2d 696 \(1st Dist. 1992\)](#) At a joint trial

for possession of heroin, a police officer testified that one defendant had made an undisclosed statement indicating his knowledge that the bag contained narcotics. The trial court denied a motion to strike the statement. The Appellate Court held that undisclosed confessions must be excluded unless the prosecution was unaware of the confession and could not have become aware through due diligence. The defense was prejudiced by the discovery violation because the undisclosed statement contradicted the defense, the violation was willful, and the defense would have been able to interview witnesses to the confession had it been disclosed in a timely manner.

[People v. Furlong, 217 Ill.App.3d 1047, 578 N.E.2d 77 \(1st Dist. 1991\)](#) At his trial for unlawful possession of a controlled substance with intent to deliver, defendant claimed that he was unaware that his shoulder bag contained cocaine, which must have been placed in the bag by a friend. On cross-examination, defendant was asked if he had told an agent that "Fortinier sold you the cocaine and you brought it up to Chicago to turn it around?" No objection was made, and defendant answered "no." The State then called the agent in rebuttal. Defendant objected to any testimony about the prior inconsistent statement because the statement had not been disclosed in discovery. The State claimed that it had complied with discovery because the agent's report listed the friend as the source of the cocaine. The agent then testified that defendant had said that he purchased the cocaine from the friend and brought it to Chicago. The Court held that merely listing the friend as the source of the cocaine did not comply with discovery rules and defendant was prejudiced. Defendant testified that he had no knowledge of the cocaine in his bag. The State's impeachment of this testimony with the undisclosed evidence that defendant admitted knowing that the cocaine was in his bag and that he intended to resell it was devastating to the defense.

[People v. Tripp, 271 Ill.App.3d 194, 648 N.E.2d 241 \(1st Dist. 1995\)](#) The State failed to disclose the substance of defendant's statements to his girlfriend. The State must reveal the substance of all known statements made by the defendant, not merely formal statements made to authorities. The defense was clearly prejudiced by the nondisclosure; the State wilfully failed to disclose a central part of its case and emphasized the undisclosed testimony in closing argument. In addition, "there is nothing to indicate that the State did not specifically intend to ambush the defense at trial."

[People v. Allen, 272 Ill.App.3d 394, 650 N.E.2d 250 \(1st Dist. 1995\)](#) The State committed a "clear discovery violation" by failing to disclose defendant's statement indicating prior knowledge that the offenses would occur; the State must disclose the substance of an oral statement upon request, and defendant was prejudiced because the statement went directly to his "sole viable defense."

[People v. Davis, 130 Ill.App.3d 41, 473 N.E.2d 387 \(1st Dist. 1984\)](#) At defendant's trial for armed robbery, the victim was allowed to testify, over objection, that during the incident defendant said that he had just robbed another man. During pretrial discovery, the defendant was not informed of the foregoing statement or the State's intent to use it. The failure to do so was reversible error.

[People v. Thompson, 18 Ill.App.3d 613, 310 N.E.2d 504 \(5th Dist. 1974\)](#) The defendant filed a pretrial motion to produce his confession, and the State responded that defendant had not made a written or oral statement regarding his participation in the crime. After the defense

rested, the State presented a rebuttal witness who related a statement by defendant which was exculpatory but inconsistent with the defendant's trial testimony. The Appellate Court reversed, holding the State was required to produce both inculpatory and exculpatory statements made by the defendant.

[People v. Miles, 82 Ill.App.3d 922, 403 N.E.2d 587 \(1st Dist. 1980\)](#) The State failed to disclose an oral statement allegedly made by the defendant to a police officer. Though the prosecutor may actually have been unaware of the statement, had he exercised due diligence he would have been aware of it. The Court noted that a police officer on the State's list of witnesses should have been questioned by the prosecutor before trial, and "it is the duty of the State to see that there is a proper flow of information between the personnel of its law enforcement agencies."

[People v. Chriswell, 133 Ill.App.3d 458, 478 N.E.2d 1176 \(2d Dist. 1985\)](#) No discovery violation occurred where a police officer destroyed notes of an interview with the defendant. The officer's two-page report was an "adequate substitute for the notes," the State used no statements that were not in the report, and defendant was not surprised by the officer's testimony. In addition, the defendant failed to show that the destroyed notes contained any exculpatory information.

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§15-3

Statements of Witnesses

[People v. Allen, 47 Ill.2d 57, 264 N.E.2d 184 \(1970\)](#) Statements made by State witnesses must be furnished, on demand, for possible impeachment purposes. The defense was entitled to examine a written statement prepared by a State witness - the value (or lack thereof) of a statement is to be decided by the defense, not the prosecution.

[People v. Peter, 55 Ill.2d 443, 303 N.E.2d 398 \(1973\)](#) Though a witness need not grant an interview to opposing counsel, neither the prosecutor nor defense counsel should advise persons to refrain from discussing the case with opposing counsel.

[People v. Wittenmyer, 151 Ill.2d 175, 601 N.E.2d 735 \(1992\)](#) The victim made several statements to a detective. Defendant argued he was denied a fair trial because the detective destroyed his handwritten notes after preparing his typewritten reports. The Court held the handwritten notes would have been discoverable if still available, but the defense suffered no prejudice where the officer included the substance of the notes in his typed reports.

[People v. Szabo, 94 Ill.2d 327, 447 N.E.2d 193 \(1983\)](#) Before trial, an important State witness was interviewed by an Assistant State's Attorney numerous times. The defendant requested disclosure of any memoranda summarizing the oral statements of the witness. The State claimed that the notes taken by the Assistant State's Attorney were "work product" and need not be produced. The trial court denied the request for disclosure. The Supreme Court remanded. Whether the notes were "work product" is a determination to be made by the trial court in camera, and not by the prosecutor. The defendant was entitled to have the notes produced for inspection by the trial court, and to disclosure of any unprivileged, substantially

verbatim statements for possible use as impeachment. See also, [People v. Young, 128 Ill.2d 1, 538 N.E.2d 461 \(1989\)](#) (defendant "was entitled to have the State's Attorney's notes of his pretrial interviews produced for in camera inspection by the circuit court, and to the disclosure of any unprivileged, substantially verbatim statements they contained for possible use in impeaching [the witness's] testimony").

[People v. Szabo, 113 Ill.2d 83, 497 N.E.2d 995 \(1986\)](#) After the remand ordered in [People v. Szabo 94 Ill.2d. 327, 447 N.E. 2d 193 \(1983\)](#) the Court held that the "work product privilege applies to substantially verbatim attorney notes only if 'they contain opinions, theories or conclusions' of the attorney." Because the notes in question were merely a shorthand transcription of the witness's own statements, they did not qualify as "work product."

[People v. Mahaffey, 128 Ill.2d 388, 539 N.E.2d 1172 \(1989\)](#) The State was not required to disclose a witness's oral statement that had not been memorialized. There was no showing that the failure to reduce the oral statement to writing constituted bad faith or was an intentional tactic.

[People v. Harris, 123 Ill.2d 113, 526 N.E.2d 335 \(1988\)](#) The Court held that the State violated discovery rules by failing to inform the defense that a witness had repudiated portions of an earlier statement. Rules 412 and 415 require a prosecutor to disclose any errors in documents that have been tendered to the defense as soon as the prosecution has such knowledge,

[People v. Thompkins, 121 Ill.2d 401, 521 N.E.2d 38 \(1988\)](#) The State did not violate discovery rules by failing to turn over a written memorandum of a statement made to an Alabama police officer by a witness. Alabama police officers are not subject to the jurisdiction of Illinois courts, and are not agents of the State whose possession and control of information is imputed to the State.

[People v. Holmes, 141 Ill.2d 204, 565 N.E.2d 950 \(1990\)](#) Before trial, the defendant requested production of a statement given by the key State witness (an accomplice) in a separate proceeding. The trial judge conducted an in camera hearing and excised portions of the statement concerning unrelated investigations. The prosecutor was present during the in camera hearing, but defense counsel was excluded. The Supreme Court held that both parties should be included or excluded at such a hearing. "However, even where defense counsel is present at an in camera hearing, he or she need not be allowed to examine the disputed material. Likewise, defendant's appellate counsel is not entitled to examine the excised material in preparing for an appeal.

[People v. Hood, 213 Ill.2d 244, 821 N.E.2d 258 \(2004\)](#) Supreme Court Rule 412 requires that upon motion of the defendant, the State must disclose the names and addresses of witnesses it intends to call, their relevant written and recorded statements, and substantially verbatim reports of oral statements. In addition, the State must disclose any reports or statements of experts along with a statement of the experts' qualifications. The court concluded that the State fulfilled its obligation under Rule 412 where it disclosed the name of a forensic pathologist as one of the witnesses to be called at trial and provided a copy of the autopsy report which the witness had prepared. Although the State did not disclose until the first day of trial that it also intended to elicit "reverse extrapolation testimony" from the witness, the prosecutor explained that he was unaware of the witness's expertise in that area until the afternoon of the trial.

Because the State disclosed the information as soon as it became known, it complied with Rule 412.

[People ex rel. Birkett v. Bakalis, 196 Ill.2d 510, 752 N.E.2d 1107 \(2001\)](#) Under new Supreme Court rules authorizing discovery in capital cases, several factors are to be considered by the trial court in exercising its discretion on a motion for a deposition, including the consequences to the party if the deposition is not allowed, the complexity of the issues, the complexity of the witness's testimony, and whether other opportunities to discover the same information are available.

[People v. Troia, 69 Ill.App.3d 439, 388 N.E.2d 35 \(1st Dist. 1979\)](#) The State's failure to disclose a witness and her statement, which was favorable to the defense, was reversible error even though the trial judge had considered the favorable evidence during post-trial motions and concluded it was insufficient to warrant a new trial.

[People v. Sanders, 39 Ill.App.3d 473, 348 N.E.2d 229 \(1st Dist. 1976\)](#) The defendant presented an alibi witness who was cross-examined concerning contradictions with a statement given earlier to police. Although the police had made written notes of the statement, the trial court denied defendant's request for the notes. The Court found error because the notes could have contained additional information explaining the conflicts, and may have been used to rehabilitate the witness.

[People v. Bass, 84 Ill.App.3d 624, 405 N.E.2d 1182 \(1st Dist. 1980\)](#) The prosecution failed to disclose that the only eyewitness to the incident had made certain statements during a polygraph examination. The polygraph examiner's report showed that the witness said he did not know the perpetrator of the offense. However, at trial the witness testified that defendant committed the offense. Since the witness was an eyewitness and the only person to supply a description of the perpetrator his credibility was crucial and the prior statements should have been disclosed.

[People v. Smith, 220 Ill.App.3d 76, 580 N.E.2d 918 \(3d Dist. 1991\)](#) On the day of defendant's trial the State disclosed, for the first time, that defendant's alibi witness had given a statement claiming that she was not with defendant at the time of the offense. The Court held that under Rule 412(a), the State must produce information regarding defenses at least seven days before trial. Although the prosecution obtained the statement only eight days before trial, "we see no reason why the State had to wait until minutes before trial" to disclose it to the defense.

[People v. Koutsakis, 255 Ill.App.3d 306, 627 N.E.2d 388 \(3d Dist. 1993\)](#) Defendant was stopped for speeding and was detained to await the arrival of a second officer with a drug dog. A search of the car revealed 205 pounds of cannabis. Defendant filed a discovery motion requesting a tape recording containing radio transmissions made by the two officers who searched his vehicle. Two days after it received the discovery request, the police destroyed the relevant transmissions. As a substitute for the tapes, the State disclosed written logs of the radio transmissions. Two officers later testified about the stop of defendant's car and one of these officers also testified that he could not recall a recent incident in which his dog had alerted but no drugs were found. In response, defendant presented a motorist who testified that eight days earlier this officer's dog had made a false alert. The trial judge found the State had unintentionally violated the discovery order. As a sanction for the violation, the trial court

limited the officers' testimony concerning several aspects of the search. The State appealed but the Appellate Court upheld the lower court's order. First, the tapes were clearly discoverable under Supreme Court Rule 412(a) as "relevant written or recorded statements" of witnesses. The tapes were obviously relevant to the reasonableness of the troopers' actions in stopping and detaining the defendant. The Court rejected the argument that discovery sanctions should be imposed only where the prosecution acts in bad faith. Supreme Court Rule 415(g) authorizes an array of sanctions for discovery violations, without regard to whether the violation occurred in bad faith.

[People v. Lowry, 354 Ill.App.3d 760, 821 N.E.2d 649 \(1st Dist. 2004\)](#) During cross-examination of one of the complainants, defense counsel asked about conversations between the witness and a second complainant. The witness responded that the complainant had called to see "how much money I wanted from the defendant to drop the charges." Although the witness testified that he had reported the conversation to one of the prosecutors, the State failed to disclose it in discovery. The trial court denied a defense motion for mistrial, finding that although the State should have disclosed the statement, there was no indication that the bribe came from the defendant. The Supreme Court held that the defendant was prejudiced by the violation. In determining whether a discovery violation necessitates a new trial, courts have relied on the: (1) closeness of the evidence, (2) strength of the undisclosed evidence, (3) likelihood that compliance with discovery rules would have helped the defense discredit the evidence, and (4) wilfulness of the State in failing to comply with discovery requirements.

Cumulative Digest Case Summaries §15-3

[People v. Lovejoy, 235 Ill.2d 97, 919 N.E.2d 843 \(2009\)](#)

1. Supreme Court Rule 412 provides that the State must disclose to the defense "any reports or statements of experts, made in connection with the particular case, including the results of physical or mental examinations and of scientific tests, experiments, or comparisons, and a statement of qualifications of the expert." Discovery rules are intended to protect against surprise, unfairness, and inadequate preparation.

The State committed a discovery violation where it disclosed a forensic expert's report which stated that a particular sample was negative to a presumptive test for the presence of blood, but did not state the expert's belief that the result was a false negative or her conclusion that DNA extracted from the sample had come from blood. At trial, the expert testified that the substance was "apparent blood" and that the sample was part of a larger stain which contained the defendant's footprint in blood.

The court acknowledged that the State properly disclosed the report which it had, and expressed its belief that the report had not been manipulated to avoid giving the defense relevant information. However, "relevant information was left out of the report, and the information provided was misleading" because the expert disclosed the result of her testing but not that she intended to disregard that result and testify to the opposite conclusion.

The court rejected the State's argument that the defense should have inferred that the expert would testify as she did. "There is nothing 'logical' about an expert testifying to a conclusion that stands in complete opposition to the conclusion stated in her own official report." Furthermore, the State did not claim that it was unaware of the expert's undisclosed conclusions, elicited the testimony which contradicted the report, and initially claimed that it had disclosed the expert's expected testimony.

2. A discovery violation necessitates a new trial only if the defendant demonstrates prejudice from the violation and that the trial court failed to eliminate the prejudice. Several factors are considered, including the closeness of the evidence, the strength of the undisclosed evidence, the likelihood the prior notice would have helped the defense discredit the evidence, and the remedy requested by the defense when the violation was discovered.

The court concluded that the defendant was prejudiced by the discovery violation because the expert's testimony concerned the "lynchpin" of the State's case, the expert's surprise testimony was "devastating" to the defense, and defendant was deprived of the opportunity to argue that the expert's test results contradicted the results of testing by another State expert. Furthermore, had the full scope of the expert's intended testimony been disclosed, defendant could have obtained a defense expert to refute the expert's contention or could have chosen to pursue a different line of defense altogether.

Although the defense did not interview the expert before trial, it did take sufficient steps to alleviate the prejudice once the discovery violation became known. The defendant sought a continuance to find an expert to refute the surprise testimony, and when that request was denied managed to obtain an expert before the next court date. However, the trial court refused to allow defendant to reopen his case to present the expert's testimony. Given the seriousness of the charge, the complexity of the evidence, and the fact that a continuance would have created no hardship, the court saw "no good reason why the trial court denied defendant's request for a continuance."

Defendant's conviction and death sentence were reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Kim Fawcett, Supreme Court Unit.)

[People v. Carballido, 2011 IL App \(2d\) 090340 \(No. 2-09-0340, mod. op., 8/10/11\)](#)

The court held that a post-conviction petition alleged the gist of a constitutional issue concerning a State investigator's failure to disclose field notes of his interview of a defense witness. The court noted that the failure to disclose material evidence after a defense request might violate due process. The witness testified at defendant's trial, and was impeached by the officer's testimony. Supreme Court Rule 412 requires the prosecution to insure a flow of information between various investigative personnel, so that the prosecutor obtains all information relevant to the case. Furthermore, [725 ILCS 5/114-13\(b\)](#) requires an investigating officer to provide the prosecutor with all investigative material, including field notes. Because the impeachment was on a critical point, and because the witness's testimony and the officer's impeachment were confusing concerning the precise content of the witness's out-of-court statement, the court directed the State to ensure that discovery requirements were completed before any proceedings occurred on remand.

(Defendant was represented by Assistant Defender Mike Vonnahmen, Springfield.)

[People v. Carballido, ___ Ill.App.3d ___, ___ N.E.2d ___ \(2d Dist. 2011\) \(No. 2-09-0340, 3/17/11\)](#)

The court held that a post-conviction petition alleged the gist of a constitutional issue concerning a State investigator's failure to disclose field notes of his interview of a defense witness. The court noted that the failure to disclose material evidence after a defense request might violate due process. The witness testified at defendant's trial, and was impeached by the officer's testimony.

Supreme Court Rule 412 requires the prosecution to insure a flow of information

between various investigative personnel, so that the prosecutor obtains all information relevant to the case. Furthermore, [725 ILCS 5/114-13\(b\)](#) requires an investigating officer to provide the prosecutor with all investigative material, including field notes. Because the impeachment was on a critical point, and because the witness's testimony and the officer's impeachment were confusing concerning the precise content of the witness's out-of-court statement, the court directed the State to ensure that discovery requirements were completed before any proceedings occurred on remand.

(Defendant was represented by Assistant Defender Mike Vonnahmen, Springfield.)

[People v. Taylor, 409 Ill.App.3d 881, 949 N.E.2d 124 \(1st Dist. 2011\)](#)

1. Supreme Court Rule 412(a)(iv) requires the State to disclose an expert's reports or statements made in connection with a case, and to include a statement of the expert's qualifications. The court concluded that the duty to disclose under Rule 412(a)(iv) did not apply to a doctor who testified as a treating physician rather than as an expert.

A. The standard of review for evaluating a discovery violation is abuse of discretion. An abuse of discretion occurs where the defendant is prejudiced by a discovery violation and the trial court fails to eliminate that prejudice. The purpose of discovery rules is to protect the defendant against surprise, unfairness, and inadequate preparation.

A discovery violation does not require a new trial unless the defendant carries his burden of showing prejudice. The failure to request a continuance is a relevant factor in determining whether the undisclosed evidence actually surprised or unduly prejudiced the defense.

B. Treating physicians are consulted for purposes of treatment, without concern whether litigation is pending or contemplated. Expert witnesses, by contrast, are retained to render an opinion concerning a matter in litigation. Although treating physicians may give opinions at trial, those opinions are developed in the course of treating the patient and not for the purpose of testifying. Whether a doctor is a treating physician or an expert depends on her relationship to the case, not on the substance of the testimony.

Here, the witness in question was a treating physician. The witness was the complainant's regular physician, and was contacted by the emergency room because the complainant needed to be admitted to the hospital. The witness treated the complainant while she was in the hospital and continued to see her every two weeks after she was discharged. Although the doctor consulted with specialists concerning the complainant's condition, and those specialists prescribed medications, the doctor did not testify concerning the diagnoses of the experts. Instead, the only opinion she gave was that the complainant had suffered a concussion. Under these circumstances, the witness was clearly a treating physician rather than an expert.

C. In any event, the defendant was not prejudiced by the physician's testimony or the State's failure to disclose her qualifications. The State disclosed the name of the doctor before trial, and informed the defense that she would be called as a medical doctor. The defendant had the complainant's hospital records before trial, and deposed the doctor before she testified. Under these circumstances, the defense had an adequate opportunity to obtain the doctor's qualifications and could not claim surprise.

2. Supreme Court Rule 412(a)(i) requires that upon written motion, the State must disclose the names and recorded statements of persons whom the State intends to call as witnesses. Defendant claimed that the State violated Rule 412(a)(i) by failing to produce reports which the treating physician sent to the complainant's employer concerning the complainant's inability to return to work.

The court found that no discovery violation occurred. First, there was no evidence that the State had access to the medical reports in question. Furthermore, the State did not rely on the medical reports in its case-in-chief; instead, the reports were first mentioned during the defendant's cross-examination of the doctor.

Even had Rule 412(a)(1) been violated, a new trial would not have been required where there was no surprise or undue prejudice. The failure to request a continuance is a relevant factor in determining whether testimony actually surprised or unduly prejudiced a party. Here, defendant moved for a mistrial, but did not seek a continuance or recess to assess the importance of the records to his case. Furthermore, the defense knew of the witness before trial and deposed her in preparing for trial. Finally, defendant's cross-examination showed his awareness that the doctor had continued to treat the complainant following her discharge.

(Defendant was represented by Assistant Defender Melissa Chiang, Chicago.)

People v. Woods, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2011) (No. 1-09-1959, 5/31/11)

1. Under Supreme Court Rule 412(a), the State must tender to the defense the identities of rebuttal witnesses and the substance of their testimony. Because the identity and specific testimony of a rebuttal witness may not be known until the defendant presents his case, the State is required to provide disclosure when it decides to call the rebuttal witness. Although disclosure is mandatory, a conviction need be reversed only if the defendant establishes that he was surprised or unduly prejudiced by the lack of disclosure.

Where the State disclosed that a rebuttal witness would testify that she saw an unidentified man run past her store while shooting a gun, it was unnecessary to decide whether Rule 412(a) was violated because the State failed to also disclose that the witness would say that the gunman stopped, turned, and fired the weapon. The court concluded that the defendant was unable to show prejudice or surprise.

2. In deciding whether the defense was prejudiced or surprised, the reviewing court must consider the closeness of the evidence, the strength of the undisclosed evidence, the likelihood that prior notice would have helped the defense discredit the evidence, and whether the failure to disclose was wilful. Failure by the defense to seek a continuance is a relevant factor in determining whether the undisclosed evidence caused any prejudice.

Here, the defense failed to request a continuance when the failure to disclose was discovered. Furthermore, the witness's testimony could not have been a surprise to the defense, because the State had earlier put forth similar testimony from other witnesses. The court noted that defendant also knew that the rebuttal witness was an eyewitness, and concluded that the defense would not have been helped by prior knowledge that the witness would testify concerning the shooter's exact body position as he fired. Finally, the State did not wilfully fail to disclose the evidence. Under these circumstances, defendant could not carry his burden to show surprise or prejudice.

Defendant's convictions for aggravated battery with a firearm and attempted first degree murder were affirmed.

(Defendant was represented by Assistant Defender Rachel Kindstrand, Chicago.)

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§15-4
List of Witnesses

[People v. Jones, 153 Ill.2d 155, 606 N.E.2d 1145 \(1992\)](#) Police officers responded to a call that two men were stripping a car. One man ran when the police arrived, and the other was apprehended. The defense objected to testimony identifying defendant as the man who ran because the State had failed to respond to a discovery request that it specifically note any identification witnesses. The Supreme Court held that no discovery violation occurred because the State was only required to disclose the names and addresses of witnesses; there is no obligation to categorize witnesses in a fashion the defense might prefer. But see, [People v. Tripp, 271 Ill.App.3d 194, 648 N.E.2d 241 \(1st Dist. 1995\)](#) (the State should have informed the defense that a person it had described as a "life-and-death" witness would testify to defendant's alleged statements; though a party need not classify witnesses in its response, it must correct any "misleading characterizations" it previously made).

[People v. Scott, 339 Ill.App.3d 565, 791 N.E.2d 89 \(1st Dist. 2003\)](#) On the day on which jury selection was to begin defense counsel filed a supplemental witness list naming, for the first time, a Public Defender investigator. The trial court excluded the investigator's testimony as a sanction for the failure to make a timely disclosure. At trial, the State's chief witness testified that he saw defendant hand a gun to a co-defendant, who shot and killed the decedent. In an offer of proof, the investigator testified that the State's witness had recanted his statement about five months previously, specifically stating that he had not seen defendant hand a gun to the co-defendant. The witness failed to keep an appointment to make a formal recantation, however, and the investigator made no written report concerning the recantation. The Court held that the trial court abused its discretion by excluding the investigator's testimony. Sanctions for noncompliance with discovery should not encroach on a party's right to a fair trial. Whether a sanction is appropriate lies within the discretion of the trial court. Factors to be considered in determining whether exclusion of a witness is an appropriate discovery sanction include the effectiveness of a less severe sanction, the materiality of the evidence, the prejudice which the violation caused to the opposing party, and whether the violation was committed in bad faith.

[People v. Perry, 210 Ill.App.3d 773, 569 N.E.2d 604 \(4th Dist. 1991\)](#) Supreme Court Rules governing discovery apply only to felony cases, but a trial judge has discretion to require parties in a misdemeanor case to furnish "lists of witnesses . . . so that the court could inquire on *voir dire* examination whether a prospective juror was acquainted with any prospective witness."

[People v. Hood, 229 Ill.App.3d 202, 593 N.E.2d 805 \(1st Dist. 1992\)](#) The Court reversed because the State failed to disclose its intent to call an Assistant State's Attorney in rebuttal or to tender the substance of his statements until after the testimony of the defense witness who was being impeached. The Court did not believe the State first made the decision to call the Assistant during trial, noting that he had testified in two prior trials and had been scheduled to testify in this trial.

[People v. Millan, 47 Ill.App.3d 296, 361 N.E.2d 823 \(1st Dist. 1977\)](#) The trial court erred by allowing the State to call the co-defendant (who had pleaded guilty 2½ months earlier); the witness was not on the State's list of witnesses and there was no justification for waiting to disclose the intent to call him. Though defense counsel was allowed to interview the co-defendant during trial, "a hurried interview is not a satisfactory substitute for prompt compliance" with discovery requirements.

[In re Lane, 71 Ill.App.3d 576, 390 N.E.2d 82 \(1st Dist. 1979\)](#) The trial judge may exclude a witness who was not disclosed as a prospective witness; however, this is an extremely harsh action, and its inappropriate use may prejudice a defendant and require reversal. Here, exclusion was not appropriate. See also, [People v. Echols, 146 Ill.App.3d 965, 497 N.E.2d 32 \(1st Dist. 1986\)](#)

[People v. Jackson, 48 Ill.App.3d 769, 363 N.E.2d 392 \(4th Dist. 1977\)](#) The defendants were inmates of a correctional institution. The defense sought to call 14 eyewitnesses who were also inmates. The trial judge excluded the witnesses' testimony because their names had not been previously disclosed to the State. The Court held that the trial judge abused his discretion by using the exclusion sanction. The 14 eyewitnesses were needed to establish or corroborate defendants' alibis, the State was presumed to have knowledge of the witnesses and the trial judge could have solved the problem by ordering a short recess or an in camera proceeding.

[People v. Rayford, 43 Ill.App.3d 283, 356 N.E.2d 1274 \(5th Dist. 1976\)](#) The trial court abused its discretion by excluding the testimony of a defense expert witness who would have discredited the State's only eyewitness. The defense met its duty to disclose as soon as the intent to call the witness was formed, and the court could have diminished surprise by ordering a continuance.

Cumulative Digest Case Summaries §15-4

People v. Blair, ___ Ill.App.3d ___, ___ N.E.2d ___ (2d Dist. 2011) (No. 2-07-0862, 5/27/11)

Supreme Court Rule 412(a)(i) requires that at the request of the defense, the State must disclose the names and last known addresses of persons whom the State intends to call as witnesses, along with their relevant written or oral statements. Supreme Court Rule 412(a)(ii) requires that a statement of the qualifications of an expert witness must also be disclosed.

The court concluded that a witness called as a treating physician is not an “expert witness” even if he or she expresses an opinion. Thus, Rule 412(a)(ii) does not require disclosure of the qualifications of a treating physician.

The court noted that a treating physician is typically not retained to render an opinion at trial, but is consulted without regard to whether litigation is pending or contemplated. When a treating physician gives an opinion at trial, that opinion stems from the treatment of the patient, not as part of litigation. Whether a doctor is a treating physician or an expert depends upon his or her relationship to the case, not on the substance of the testimony.

Defendant’s conviction for aggravated domestic battery was affirmed.

(Defendant was represented by Assistant Defender Jonathan Krieger, Chicago.)

People v. Woods, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2011) (No. 1-09-1959, 5/31/11)

1. Under Supreme Court Rule 412(a), the State must tender to the defense the identities of rebuttal witnesses and the substance of their testimony. Because the identity and specific testimony of a rebuttal witness may not be known until the defendant presents his case, the State is required to provide disclosure when it decides to call the rebuttal witness. Although disclosure is mandatory, a conviction need be reversed only if the defendant establishes that he was surprised or unduly prejudiced by the lack of disclosure.

Where the State disclosed that a rebuttal witness would testify that she saw an unidentified man run past her store while shooting a gun, it was unnecessary to decide whether Rule 412(a) was violated because the State failed to also disclose that the witness would say

that the gunman stopped, turned, and fired the weapon. The court concluded that the defendant was unable to show prejudice or surprise.

2. In deciding whether the defense was prejudiced or surprised, the reviewing court must consider the closeness of the evidence, the strength of the undisclosed evidence, the likelihood that prior notice would have helped the defense discredit the evidence, and whether the failure to disclose was wilful. Failure by the defense to seek a continuance is a relevant factor in determining whether the undisclosed evidence caused any prejudice.

Here, the defense failed to request a continuance when the failure to disclose was discovered. Furthermore, the witness's testimony could not have been a surprise to the defense, because the State had earlier put forth similar testimony from other witnesses. The court noted that defendant also knew that the rebuttal witness was an eyewitness, and concluded that the defense would not have been helped by prior knowledge that the witness would testify concerning the shooter's exact body position as he fired. Finally, the State did not wilfully fail to disclose the evidence. Under these circumstances, defendant could not carry his burden to show surprise or prejudice.

Defendant's convictions for aggravated battery with a firearm and attempted first degree murder were affirmed.

(Defendant was represented by Assistant Defender Rachel Kindstrand, Chicago.)

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§15-5

Material to Impeach Witnesses

§15-5(a)

Generally

[Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 \(1974\)](#) The right of confrontation is paramount to a State policy of protecting the anonymity of juvenile offenders. The defendant was denied the right to confront witnesses when he was prohibited on cross-examination from showing that the key prosecution witness was on probation following an adjudication of juvenile delinquency. The Court concluded that the defendant had the right to attempt to show that the witness was biased and under undue pressure because of his status as probationer. See also, [Giglio v. U.S., 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 \(1972\)](#), where reversible error occurred when the State failed to disclose that a witness had been promised immunity in return for cooperation. A promise by one prosecutor who dealt with the witness is attributable to the government even if the promise is not disclosed to the prosecutor who tried the case.

[U.S. v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 \(1985\)](#) The prosecution's failure to disclose impeachment evidence (i.e. that prosecution witnesses were paid to provide information) is reversible error only if such evidence might have affected the outcome of the trial. See also [Strickler v. Greene 527 U.S. 263, 110 S. Ct.1936, 144 L.Ed. 2d 286 \(1999\)](#)

[U.S. v. Ruiz, 536 U.S. 622, 122 S.Ct. 2450, 153 L.Ed.2d 586 \(2002\)](#) The Federal Constitution does not require that before pleading guilty, a criminal defendant must receive "impeachment information relating to any informants or other witnesses" or information supporting affirmative defenses that might be raised. The court stressed that the right to receive

exculpatory or impeachment information concerns the fairness of a criminal trial, not the voluntariness of a guilty plea.

[People v. Sims, 167 Ill.2d 483, 658 N.E.2d 413 \(1995\)](#) Defendant contended that the State failed to disclose evidence concerning the criminal record and drug use of one of its witnesses. Here, however, the error was harmless because defense counsel learned of the non-disclosed matters during trial and was given ample opportunity to cross-examine the witness.

[People v. Coates, 109 Ill.2d 431, 488 N.E.2d 247 \(1985\)](#) The defendant was convicted of child pornography and indecent liberties. The alleged victim was the daughter of defendant's wife, who testified for the State. To impeach his wife's testimony, defendant sought to subpoena records from the Department of Children and Family Services. Defendant's theory was that his wife had a history of child neglect and making unfounded claims of abuse by her various boyfriends and husbands. The trial court conducted an in camera inspection of the records, without counsel present, and permitted the defense to use a portion of the records for impeachment. Defendant argued that he should have been allowed to attend the [hearing at](#) which the records were examined but the Supreme Court rejected this argument.

[People v. Galloway, 59 Ill.2d 158, 319 N.E.2d 498 \(1974\)](#) Defense counsel repeatedly requested the arrest or police record of the State's key witness. The prosecutor said that the witness had no convictions that could be used for impeachment and no pending charges since the time of the defendant's arrest. After trial, defense counsel learned that the witness had been released from jail on a pending armed robbery charge shortly before the trial. In addition, before and after trial, charges against the witness had been stricken on State motions. The Supreme Court held that the defense was entitled to the arrest report to show interest or bias on the part of the witness. In addition, the State's false representation of the witness's record deprived defendant of due process.

[People v. Dace, 104 Ill.2d 96, 470 N.E.2d 993 \(1984\)](#) Defendant was convicted of burglary based upon the testimony of an admitted accomplice. Defendant moved for discovery of the mental health history of the accomplice, noting that she had been involuntarily committed about two years before the burglary. The State claimed privilege, and the trial judge denied the defendant's request. The Appellate Court held if privilege is claimed by the accomplice or her therapist, the trial judge should conduct an in camera hearing, in the presence of counsel, to determine what information would be relevant.

[People v. Elston, 46 Ill.App.3d 103, 360 N.E.2d 518 \(4th Dist. 1977\)](#) The State erred by failing to disclose until trial that two of the five occurrence witnesses had identified someone other than the defendant at a lineup, and that another two witnesses had been unable to make any identification. The evidence was clearly favorable to the accused, and had it been disclosed before trial the defense might have had time to make further investigation and adjust its trial strategy.

[People v. DiMaso, 100 Ill.App.3d 338, 426 N.E.2d 972 \(1st Dist. 1981\)](#) Defendant was charged with aggravated battery and presented an alibi defense. The complainant was the only witness to the incident. During pretrial investigation, the defense learned that ten days before the incident the complainant had passed out and was treated at a hospital. The defense sought to obtain the hospital records to show that the complainant suffered blackouts and was

disoriented due to alcoholism and drug addiction. The trial judge refused the defense request citing the confidentiality provisions of the Mental Health Act. The Appellate Court reversed, holding that the State's interest in protecting patients must yield to the defendant's right to effective cross-examination.

[People v. Godina, 223 Ill.App.3d 205, 584 N.E.2d 523 \(3d Dist. 1991\)](#) After defendant was convicted defense counsel discovered that a State witness had an undisclosed residential burglary charge pending at the time of trial. The prosecutor claimed that the non-disclosure was inadvertent because it had misspelled the witness's name in making a computer check for pending charges. Nonetheless, the Court held that the State's failure to disclose the pending charge was reversible error because defendant clearly could have utilized the information in preparing his defense.

[People v. Tonkin, 142 Ill.App.3d 802, 492 N.E.2d 596 \(3d Dist. 1986\)](#) The Court held that the State committed reversible error in failing to disclose that its key witness had three prior convictions for forgery. Supreme Court Rule 412 places a "continuing duty" upon the prosecution to disclose any criminal record which may be used for impeachment of its witnesses.

[People v. Roby, 169 Ill.App.3d 187, 523 N.E.2d 631 \(5th Dist. 1988\)](#) The State is required to disclose that its witness had previously been a paid informer. See also, [People v. Gennardo, 184 Ill.App.3d 287, 539 N.E.2d 400 \(1st Dist. 1989\)](#) (State erred by failing to disclose that its principal witness was a paid informant and had testified in exchange for favorable sentencing consideration.)

Cumulative Digest Case Summaries §15-5(a)

[People v. Porter-Boens, 2013 IL App \(1st\) 111074 \(No. 1-11-1074, 9/5/13\)](#)

When confidential records are sought in discovery, the trial court should review the records *in camera* and use its discretion to disclose only material information. The trial court has broad discretion in ruling on issues of relevance and materiality and its determination will not be disturbed absent an abuse of discretion. A court abuses its discretion if its decision rests on an error of law.

Prior allegations of misconduct by a police officer may be admitted to prove intent, plan, motive, or a course of conduct of the officer, or to impeach an officer as a witness based on bias, interest, or motive to falsify. In determining the admissibility of prior allegations of misconduct, the trial court should consider the temporal proximity of the past misconduct, the similarity of the past misconduct to the conduct at issue, and whether there is a repetition of similar misconduct. The trial court may properly exclude evidence of prior allegations if the officer did not receive discipline from his department. A single incident years removed from the event at issue has little relevance, but a series of incidents spanning several years can be relevant to establishing a claim of a pattern and practice.

The trial court properly applied these standards in conducting an *in camera* inspection of records that the defense subpoenaed from the Independent Police Review Authority. The trial court did not abuse its discretion in determining that it would limit disclosure allegations of police misconduct occurring within three years of the charged offense, or in refusing to disclose allegations determined to be unfounded or not sustained, as mere allegations of misconduct are

not probative. Moreover, none of the allegations of misconduct were similar to those made in defendant's case, nor did they involve similar incidents spanning several years.

(Defendant was represented by Assistant Defender Todd McHenry, Chicago.)

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§15-5(b)

Obligation to Correct Misleading Testimony

[Miller v. Pate, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690 \(1967\)](#) Prosecution must correct false testimony that goes to the credibility of witnesses.

[People v. Jimerson, 166 Ill.2d 211, 652 N.E.2d 278 \(1995\)](#) Defendant's conviction was based on the testimony of a witness who stated the State had not promised her lenient treatment in return for her testimony. In his post-conviction petition, defendant alleged that in his co-defendants' case the State disclosed that it had promised to dismiss a murder charge against the witness if she testified. The petition also pointed out that the State had admitted making such a promise in its brief on direct appeal in the defendant's case. The Supreme Court held that the knowing use of perjury in a criminal trial violates due process, and the prosecution must correct false testimony that its witnesses place before the trier of fact. Since the State had disclosed in the co-defendants' case that promises had been made to the witness, it must have known that the witness had testified falsely at defendant's trial. In addition, at three separate places in its brief on direct appeal the State said that the witness testified against defendant "in exchange" for an agreement not to pursue murder charges against her. Finally, after the State obtained convictions against defendant and the co-defendants, it allowed the witness to plead guilty to perjury charges in return for probation. A reviewing court is "not required to suspend common sense," and a "common sense view of this evidence lends substantial support to the conclusion that [the witness's] denials of a deal were false." See also, [People v. Olinger, 176 Ill.2d 326, 680 N.E.2d 321 \(1997\)](#) (witness testified he was to receive immunity on one offense; prosecutor's office knew he was beneficiary of "global" deal resolving charges in several jurisdictions); [People v. Nino, 279 Ill.App.3d 1027, 665 N.E.2d 847 \(3d Dist. 1996\)](#) (State breached its duty to correct misleading testimony where it presented witness as having no felony convictions where he in fact had "a strong motivation to please the State in order to avoid" a long penitentiary sentence; State also "deliberately manipulated the timing of [the witness's] pending cases so that he would have no felony convictions at the time he testified, . . . thereby precluding impeachment by the defense")

[People v. Lucas, 203 Ill.2d 410, 787 N.E.2d 113 \(200\)](#) A conviction obtained through the use of perjured testimony raises due process concerns. Where the State knew of its witness's perjury, but failed to correct it, the conviction must be reversed if there is any reasonable likelihood that the false testimony affected the jury's verdict. Here the court held that even if a State witness had perjured himself concerning consideration he received from the State for testifying, the witness's testimony was not crucial to the State's case. The witness did not offer direct identification testimony or connect defendant to the murder weapon, but testified only in support of the State's motive theory. Even then, the witness's testimony was not the sole evidence of motive.

[People v. Diaz, 297 Ill.App.3d 362, 696 N.E.2d 819 \(1st Dist. 1998\)](#) It is "well-settled that a

prosecutor cannot knowingly use, or allow to go uncorrected, perjured testimony that goes to the substance of a witness's testimony" or to facts that bear on his credibility. Here, the record shows at least an implied agreement that the witness would receive lesser sentences in return for testifying against the defendant. However, the failure to correct the perjured testimony was not a "material" error because, in light of the other evidence and impeachment evidence which was admitted, there was no "reasonable probability" that the result of the proceeding would have been different had the false testimony been corrected. See also, [People v. Torres, 305 Ill.App.3d 679, 712 N.E.2d 835 \(2d Dist. 1999\)](#) (the obligation to correct false testimony exists where the prosecutor has personal knowledge that the testimony is false and where the falsity is known only to other agents of the prosecution).

[People v. Paris, 295 Ill.App.3d 372, 692 N.E.2d 848 \(4th Dist. 1998\)](#) Defense counsel expected three subpoenaed attorneys to testify that the State's witnesses made deals with the State before they testified at defendant's trial. Where prosecutors, judges, and (in certain circumstances) criminal defense attorneys and reporters are called to testify, the "special witness" doctrine may apply. Under this doctrine, the trial court should conduct a hearing to determine whether the subpoenas should stand. To obtain the testimony, the defense must make a plausible showing that the evidence is material and favorable by setting forth the testimony it expects to elicit, an explanation of its relevance and necessity, and the efforts made to secure the evidence through alternative means. Here, the prosecutor and one of the defense attorneys indicated that no firm arrangement had been reached with the witnesses and that no negotiations had taken place before defendant's trial. "[A]fter these comments by the attorneys, there was no basis for the defendant to believe a deal had been reached."

[People v. Potter, 384 Ill.App.3d 1051, 894 N.E.2d 490 \(4th Dist. 2008\)](#) A conviction based on perjured testimony violates due process. The State is required to correct false testimony without regard to whether it solicited the evidence, and even where the evidence concerns merely witness credibility. A witness's motivation to testify against the defendant, including the hope of leniency on other charges, is relevant to determining credibility. Although the State has no affirmative duty to disclose promises of leniency made in return for testimony, it must correct a witness's false testimony that such a promise has not been made. An agreement for leniency in return for testifying need not be formal - the witness need only to have reached an understanding with the prosecution that she will receive a distinct benefit by testifying against the defendant. Although the witness here testified that no promises had been made, at a hearing a few days earlier the witness's attorney stated that the witness had an "agreement" with the State. At the same hearing, the prosecutor said that the State wanted to delay the witness's guilty plea hearing until after defendant's trial was finished. In addition, on the day after the witness testified against the defendant, she received a probation sentence which the State requested.

[People v. Junior, 349 Ill.App.3d 286, 811 N.E.2d 1267 \(4th Dist. 2004\)](#) Due process is violated where the State knowingly uses perjury. A conviction must be reversed where there is a reasonable likelihood that perjured testimony could have affected the jury's verdict. The same principles apply where the State does not solicit perjured testimony, but allows such testimony to stand uncorrected. The duty to correct false testimony is triggered whenever any representative or agent of the prosecution knows that a witness's testimony is untruthful.

Due process was violated at defendant's trial where the State failed to correct the perjured testimony of a co-defendant who pleaded guilty and agreed to testify against

defendant in return for concurrent sentencing. During his testimony, however, the co-defendant stated that he had received no sentencing concessions and that he was testifying because he had been served with a subpoena. The prosecutor's failure to correct the co-defendant's testimony, combined with an improper closing argument, violated due process.

[People v. Tidwell, 88 Ill.App.3d 808, 410 N.E.2d 1163 \(2d Dist. 1980\)](#) An accomplice testified as the State's main witness and specifically denied that any promises of leniency had been offered for his testimony. The State did not present any evidence to correct this false testimony, but in closing argument the prosecutor stated that the accomplice would not be charged in consideration of his testimony against the defendant. The Court held that the defendant's due process rights were violated by the State's failure to correct the accomplice's false testimony. "It was highly unfair to permit (the accomplice) to swear without contradiction that he received no benefit from testifying when, in fact, in return for his testimony he was immunized from prosecution for armed robbery."

[People v. Griffin, 124 Ill.App.3d 169, 463 N.E.2d 1063 \(5th Dist. 1984\)](#) At defendant's trial for murder, a State witness identified the defendant as the perpetrator. The witness also testified that he knew of no promises or negotiations concerning his pending charges in return for his testimony. However, at a post-conviction hearing the State's Attorney admitted that he had an understanding with the witness's attorney that the State was "holding off" on a pending case to maintain "leverage" on the witness. Although the witness denied that his attorney had told him about the understanding with the prosecutor, the Court found that "it seems unlikely that an attorney would have withheld information about a possible benefit his client could gain through his own action." The jury was entitled to know of the above "understanding" and the State had the "duty to correct any false impression left by [the witness's] flat denial that he expected any consideration from the State."

Cumulative Digest Case Summaries §15-5(b)

[People v. Garcia, 405 Ill.App.3d 608, 939 N.E.2d 972 \(1st Dist. 2010\)](#)

The prosecution's knowing use of perjury to obtain a conviction violates the defendant's right to due process. To make a substantial showing of a violation of this constitutional right, defendant must demonstrate that the perjured testimony was material. Materiality is demonstrated by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. Materiality is not a sufficiency-of-the-evidence test. Favorable evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

Defendant's post-conviction petition alleged that serologist and microbiologist Pamela Fish of the Illinois State Police crime lab falsely reported that swabs taken from the vagina, mouth and rectum of the deceased were negative for the presence of sperm or semen, that the samples of human blood found on the scene were insufficient for typing, and that a jacket found on the scene tested negative for the presence of blood. This claim lacked materiality. The court could not say that, but for Fish's input, defendant's trial would have ended differently. None of the evidence adduced at trial tended to show that defendant had physical contact with the deceased. Proof that defendant's bodily fluids were not present on the deceased or the location where she was found would avail the defendant nothing.

The court affirmed the dismissal of the petition without an evidentiary hearing.
(Defendant was represented by Assistant Defender Caroline Bourland, Chicago.)

[Griffin v. Pierce, 622 F.3d 831 , 2010 WL 3655899 \(7th Cir. 2010\)](#)

A conviction is obtained in violation of the Fourteenth Amendment where: (1) the prosecution presents false testimony or fails to disclose that false testimony was used to convict; (2) the prosecution knows or should know that the testimony is false; and (3) there is a reasonable likelihood that the testimony could affect the jury's verdict.

There was no reasonable likelihood that the false testimony of a prosecution witness denying receiving any money from the prosecution could have affected the jury's judgment. Even discounting the testimony of the prosecution witness who testified falsely, defendant's conviction was secure. Defendant made a court-reported confession testified to by both the court reporter and an Assistant State's Attorney, who also testified to a consistent oral confession made to him by the defendant. Defendant's refusal to sign the court-reported statement was of little consequence. There was an audiotape of a conversation between the witness and the defendant in which the defendant confessed. The Assistant State's Attorney testified that he overheard that conversation. Although the tape recording was unintelligible at the time of the habeas proceeding, there was no evidence that it was unintelligible at the time of the state court proceedings.

(Defendant was represented by Staff Attorney Gregory Swygert, Capital Post-Conviction Unit.)

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§15-6

Informers

[Roviaro v. U.S., 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 \(1957\)](#) The government's privilege to withhold disclosure of an informer's identity must give way where the identity, or the contents of his communication, is relevant and helpful to the defense of an accused.

[People v. Lewis, 57 Ill.2d 232, 311 N.E.2d 685 \(1974\)](#) The defendant was entitled to disclosure of the informer's identity at trial; the informer was the only person present at the alleged sale other than defendant and a policeman, and was the only witness who could amplify or contradict the officer's testimony. In such instances the defendant must at a minimum be allowed to interview the informer, and if desired to call him as a witness. However, the informer should not be forced to disclose his true name and address if it can be shown that his life or safety is in jeopardy. See also, [People v. Woods, 139 Ill.2d 369, 565 N.E.2d 643 \(1990\)](#).

[People v. Holmes, 135 Ill.2d 198, 552 N.E.2d 763 \(1990\)](#) The Court set out a three point test to determine whether charges should be dismissed due to the unavailability of an informer. When a defendant seeks production of an informant, he must demonstrate the materiality and relevance of the informant's testimony. If defendant meets this burden, the State must produce the informant or make a good-faith effort to make the informant available. If the State has failed in its good-faith effort to locate the informant, defendant is entitled to a dismissal if he can "demonstrate that, in the context of all of the evidence that has been or will likely be presented at trial, the unavailable evidence would raise a reasonable doubt as to the State's

case." This burden is higher than that of showing the informant's testimony to be material and relevant.

[People v. Bufford, 277 Ill.App.3d 862, 661 N.E.2d 357 \(1st Dist. 1995\)](#) Although the State has a qualified privilege to withhold the identity of its informant, in appropriate circumstances that privilege must give way to the defendant's Sixth Amendment rights. Whether the identity of an informant must be disclosed in a particular case is to be determined by balancing the public's interest in protecting the flow of information against the individual's right to prepare a defense. Here, that balancing test favored disclosure. The informant had witnessed and participated in the events leading to defendant's arrest. In addition, there was a serious question whether defendant or his brother was the person who allegedly sold cocaine to the informer. Moreover, the State made no specific showing that disclosure of the informant's identity would jeopardize his safety. The Court rejected the State's argument that it could successfully resist disclosure merely by asserting that there might be a possible threat to the informant's safety; to succeed in keeping an informant's identity secret, the State must articulate a specific basis for concern other than the "general concern commonly understood to be present in cases involving confidential informants."

[People v. Bell, 373 Ill.App.3d 811, 869 N.E.2d 807 \(1st Dist. 2007\)](#) The prosecution has a qualified privilege regarding the disclosure of a secret surveillance location; whether such a location should be disclosed is decided on a case-by-case basis by balancing the public interest in keeping the location secret and the defendant's need to prepare a defense. The trial court "should endeavor to protect the 'public interest in secrecy ' but must also take the steps necessary to ensure accurate fact finding." Among the factors in determining whether the privilege applies are: (1) the crime charged, (2) the possible defenses, and (3) the potential significance of the privileged information. Disclosure of the location of secret surveillance will be compelled if the information is material to the issue of guilt. See also, [People v. Quinn, 332 Ill.App.3d 40, 772 N.E.2d 872 \(1st Dist. 2002\)](#)

[People v. Knight, 323 Ill.App.3d 1117, 753 N.E.2d 408 \(1st Dist. 2001\)](#) Where the State claims a surveillance privilege at trial, the court should conduct an in camera hearing outside the presence of defendant and defense counsel. The State should be required to reveal the exact surveillance location and make a preliminary showing that "disclosure of the surveillance location would harm the public interest." The trial court must then weigh the defendant's need for the information against the public's interest in non-disclosure, considering such factors as the nature of the crime charged, the possible defenses, and the potential significance of the information for which the privilege is claimed. When the State's case rests solely on the officer's testimony, disclosure "must almost always be ordered." Otherwise, "the application of the [surveillance] privilege will severely hamper the defendant's ability to cross-examine the officer on the key factual issues." Here, questions were raised about the officer's ability to observe the defendant and the alleged drug transaction, and there was no videotape or other objective evidence providing the same information. Under such circumstances, the trial court erred by failing to require the State to disclose the exact surveillance location. See also, [People v. Criss, 294 Ill.App.3d 276, 689 N.E.2d 645 \(4th Dist. 1998\)](#) (to overcome the "secret surveillance location" privilege, the defendant must demonstrate a need for disclosure that goes beyond "mere speculation that the information may possibly prove useful"; whether disclosure is required is decided on a case-by-case basis by "balancing the public interest in keeping the location secret with the defendant's interest in preparing a defense"; even where the defendant

is unable to overcome the privilege, he is permitted to cross-examine "the police officer's observations with respect to distance, weather and any possible obstructions").

[People v. Connor, 176 Ill.App.3d 900, 531 N.E.2d 966 \(1st Dist. 1988\)](#) The defendants raised an entrapment defense. One of the defendants owned a shipping business, while the other defendant was an account executive for the business. According to the defendants, an informant (referred to as B.J.) owed the business over \$13,000. Because of this debt, the defendants had difficulty paying their bills and were unable to book any new business. B.J. persistently urged defendants to obtain cocaine (for an undercover police officer) so that B.J. could pay his debt. The defendants eventually did so, and were arrested. The undercover officer to whom the cocaine was delivered denied any knowledge of B.J.'s activities. The defendants sought disclosure of B.J.'s identity and whereabouts but their request was denied. The Court held that the State's refusal to disclose the informer's identity was reversible error, noting that the issue of predisposition was crucial to the entrapment defense, and that B.J.'s activities were crucial to determining whether predisposition existed.

[People v. Perez, 209 Ill.App.3d 457, 568 N.E.2d 250 \(1st Dist. 1991\)](#) The defendant participated in three sales of cocaine to an undercover agent. All of the sales were arranged by an informant, who was also present at each sale. Defendant testified he was entrapped and that he participated in the sales only after the informant threatened to harm his family. Defendant sought discovery on the informant but the prosecutor, after claiming that the informant would not be called as a witness, used the informant as a witness in rebuttal. The Court held that defendant was entitled to the information sought in discovery because the informant played an active role in the criminal acts.

[People v. Raess, 146 Ill.App.3d 384, 496 N.E.2d 1186 \(1st Dist. 1986\)](#) The defendant requested the disclosure of the identity of an informant known as "Vinnie." The trial court found that the disclosure of the informant could be relevant in the preparation of the entrapment defense, and ordered the State to disclose the informant's identity. The State refused, and the trial court dismissed the charges. The Appellate Court affirmed the dismissal finding that the uncontradicted assertions in defendant's affidavit in support of discovery were sufficient to raise the issue of entrapment.

[People v. Gibson, 54 Ill.App.3d 898, 370 N.E.2d 262 \(4th Dist. 1977\)](#) Trial court erred by refusing to compel disclosure of the identities of two informers, who were material witnesses, until the close of the State's case. Merely allowing defense counsel to interview the informers without the participation of the defendant was not a valid substitute for disclosure of their identities.

[People v. Brown, 151 Ill.App.3d 446, 502 N.E.2d 850 \(2d Dist. 1986\)](#) Due process is not violated if police do not obtain the name of anonymous informers who call a "Crimestoppers" program.

Cumulative Digest Case Summaries §15-6

[People v. Stapinski, 2015 IL 118278 \(No. 118278, 10/8/15\)](#)

After he was arrested for unlawful possession of ketamine with intent to deliver,

defendant entered an agreement with police to assist in apprehending the persons to whom he was supposed to deliver the ketamine. Approximately a year after defendant provided such assistance, and the intended recipients had been prosecuted, defendant was charged with unlawful possession of ketamine with intent to deliver.

At a hearing on his motion to dismiss the charge, defendant, his mother, and his attorney testified that defendant and the police had agreed that the ketamine charge against defendant would be dropped in return for his cooperation in apprehending the intended recipients of the substance. Furthermore, if defendant assisted in four additional cases, an old drug charge would also “go away.” A police officer testified, however, that defendant was required to assist in the additional four cases in order to obtain dismissal of the ketamine charge.

The trial court dismissed the charge after concluding that the agreement was to dismiss the ketamine charge in return for assisting the police in apprehending the two intended recipients. The trial judge found that defendant had fulfilled his obligations under the agreement, and that due process was violated because defendant incriminated himself based on a bargain which the State refused to honor.

The Appellate Court reversed, finding that the only prejudice suffered by defendant was that he made incriminating statements. The Appellate Court found that defendant would be protected if the incriminating statements were suppressed.

The Supreme Court affirmed the trial court, finding that there was a due process violation.

1. Cooperation agreements benefit law enforcement by permitting police to apprehend large-scale drug dealers. Such agreements are to be construed under general contract principles. Because of the unequal bargaining positions of police officers and suspects, governmental agencies are obliged to deal fairly with persons who, in return for offers of immunity, agree to provide information which may expose them to greater criminal liability.

Due process is implicated where the State’s actions toward its citizens are oppressive, arbitrary, or unreasonable. The trial court has inherent discretion to dismiss a charge where the State has violated due process.

The court concluded that where the trial judge found that the parties agreed that defendant would have his charge dismissed in return for helping officers apprehend the recipients of the ketamine, and defendant fulfilled the agreement, the trial court did not abuse its discretion by dismissing the charge.

2. The court rejected the State’s argument that in the absence of the prosecutor’s approval, there was no valid agreement that defendant’s charge would be dropped. Although police officers cannot bind the State’s Attorney, the court found that the issue was whether due process concerns require that a person who fulfills his obligation under an agreement which was negotiated with police is entitled to be treated with fairness and justice. “Whether or not the cooperation agreement was ‘valid’ in the sense that it was approved by the State’s Attorney, is not important. An unauthorized promise may be enforced on due process grounds if a defendant’s reliance on the promise has constitutional consequences.”

The trial court’s dismissal order was affirmed.

[People v. Clark, 2013 IL App \(2d\) 120034 \(No. 2-12-0034, 3/29/13\)](#)

1. Supreme Court Rule 412(j)(ii), which codifies the common law “informer’s privilege,” protects against disclosure of an informant’s identity where that identity is a prosecution secret and the failure to disclose does not infringe the constitutional rights of the accused. There is no fixed rule with respect to disclosure of the identity of confidential informants. Instead, the

ultimate issue is whether considering all the relevant circumstances, the defendant has demonstrated that his interest in preparing a defense outweighs the public interest in the free flow of information that can assist in the detection and prosecution of crimes.

A defendant who moves to compel disclosure of an informant's identity has the burden to show that disclosure is necessary to prepare a defense. To meet this burden, the defendant must show that the defense theory for which the informant's identity is necessary has an evidentiary basis and is not founded on mere speculation.

Although the defendant bears the burden of proving that disclosure of the informant's identity is essential to preparing the defense, the State has the burden of proof concerning claims that the informant's safety would be endangered if his or her identity is disclosed. The State failed to carry this burden where an officer who testified that the informant's safety might be endangered also admitted that the danger was no greater than in any confidential informant case.

2. The court concluded that the trial court erred by ordering the State to disclose the informant's identity because the defendant's theory – that the confidential informant had conspired with police officers and defendant's ex-girlfriend to frame him - was vague and based on speculation rather than on viable evidence.

3. In the course of its opinion, the court noted that Illinois law is unclear concerning the standard of review to be applied to the trial court's order requiring that an informant's identity be disclosed. The court declined to resolve the uncertainty, however, finding that under either the abuse of discretion or *de novo* standard of review the trial court's order was erroneous.

(Defendant was represented by Assistant Defender Steve Wiltgen, Elgin.)

[People v. Flournoy, 2016 IL App \(1st\) 142356 \(No. 1-14-2356, 11/3/16\)](#)

1. Appellate Court precedent recognizes a qualified privilege on behalf of the State regarding disclosure of secret surveillance locations. Whether disclosure of a surveillance location should be required is determined on a case-by-case basis and requires balancing the public interest in keeping the location secret against the defendant's interest in preparing a defense. Where a witness is important to the State's case, the defendant's right to cross-examination concerning the surveillance location is equally important.

Where the State's case depends almost exclusively on a single officer's testimony concerning surveillance, disclosure of the location is almost always required. By contrast, where there is no question about the officer's ability to observe or an incident appears on a contemporaneous video recording, disclosure is generally not required.

2. The State bears the initial burden of proof to demonstrate that the surveillance privilege should apply in a given case. The State carries this burden by presenting evidence that the surveillance location was either on private property with the permission of the owner or in a location that is useful to law enforcement and the utility of which would be compromised by disclosure. Such evidence is to be presented in an *in camera* hearing outside the presence of defendant and defense counsel.

The State's witness must reveal the surveillance location at the *in camera* hearing, and the trial court must make a preliminary finding whether disclosure of the location would harm the public interest. Factors to be considered in determining the public interest in non-disclosure include the crime charged, the possible defenses, and the potential significance of the privileged information. Supreme Court Rule 415 provides that a record of the *in camera* proceeding must be made, sealed, and preserved for the reviewing court.

If the State carries its burden at the *in camera* hearing, the burden of persuasion to overcome the privilege shifts to the defendant. At a pretrial hearing, the defendant overcomes

the privilege by showing that the disclosure of the location is material or necessary to his defense and that the need for the information outweighs the public's interest in keeping the location secret. Where the State seeks to invoke the privilege at trial, however, due process requires that the privilege is overcome if the defendant shows that the location is relevant and helpful to the defense or essential to a fair determination of the case.

3. The trial court erred by overruling defendant's request for disclosure of the location from which an officer observed an alleged drug transaction. First, although no record was made of the *in camera* hearing, the responsibility for ensuring preparation of the record rested with the State, which was asserting the privilege and therefore also had the burden of ensuring that a record was made. The court rejected the argument that the defense is responsible for seeing that a record is made of an *in camera* hearing concerning the State's assertion of privilege.

4. Second, the trial judge erred where, after finding that the State met its initial burden at the *in camera* hearing, it failed to consider whether defendant had overcome the privilege. Once the State meets its initial burden, the trial court must weigh the defendant's need for the surveillance location against the public's interest in non-disclosure. The trial court found that the State had made a preliminary showing that disclosure would harm the public interest, but failed to balance the public interest in keeping the location secret and defendant's interest in preparing a defense.

The Appellate Court concluded that disclosure was warranted because the officer's testimony concerning his observations of alleged drug transactions was the linchpin of the State's case. There were no occurrence witnesses other than the observing officer, and no inculpatory statements or contemporaneous video recordings. Where a case rests almost exclusively on an officer's testimony, disclosure must almost always be ordered.

Furthermore, although the officer testified that he saw defendant receive paper currency from three separate buyers and that he never lost sight of defendant, that testimony was adversely affected by the fact that no money was recovered from defendant's person.

The conviction for possession of a controlled substance with intent to deliver was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Arianne Stein, Chicago.)

[People v. Price, 404 Ill.App.3d 324, 935 N.E.2d 552 \(1st Dist. 2010\)](#)

The surveillance-location privilege is a common-law privilege that is based on and evolved from the informant's privilege. Its purpose is to protect sources from retaliation and encourage continued cooperation with the police. The privilege is not absolute, but qualified, and the need for non-disclosure must be balanced against the defendant's constitutional right to a fair trial. A surveillance location must be disclosed at trial if it is material to the issue of guilt or innocence. A presumption exists in favor of disclosure where the prosecution's case is based primarily on eyewitness testimony.

When disclosure is requested at trial, the State has the initial burden of proof. It must present evidence that the surveillance point is either: (1) on private property with the permission of the owner; or (2) in a useful location whose utility would be compromised by disclosure. The burden then shifts to the defense to persuade the court that the surveillance location is relevant and helpful to the defense or essential to a fair determination of the cause. The trial court must balance the public interests underlying the privilege against the defendant's need for disclosure to defend himself at trial based on the specific facts of each individual case.

If disclosure is requested at a preliminary hearing or hearing on a motion to suppress, the analysis is different. The court has more discretion to decline disclosure at those stages.

Defendant must make a strong showing that disclosure is material or necessary to his defense and that his need for the information outweighs the public's interest in keeping the surveillance location secret.

Applying these principles, the Appellate Court found that error occurred at defendant's trial where the court denied a request for disclosure absent any showing by the State of any need for non-disclosure, and without the court balancing any need of the defendant for disclosure against any reason for non-disclosure. The trial court merely applied its policy not to require disclosure because homes of private citizens are often involved.

(Defendant was represented by Assistant Defender Kathleen Flynn, Chicago.)

People v. Reed, 2013 IL App (1st) 113465 (No. 1-11-3465, 12/31/13)

1. The State has a qualified privilege concerning the disclosure of a secret surveillance location. Whether disclosure should be ordered is decided on a case by case basis, balancing the public interest in keeping the location secret with the defendant's interest in preparing a defense. The trial court's decision whether to disclose the surveillance location is reviewed for abuse of discretion.

Whether knowledge of a secret surveillance location is important to the defendant's right to cross-examination depends on the importance of the witness to the prosecution's case. If the State's case depends almost exclusively on the testimony of a single police officer, disclosure is more likely to be required. By contrast, disclosure is usually unnecessary where there is no question about the officer's ability to observe or where a video tape was made contemporaneously with the incident.

If the State invokes the privilege against disclosure of the surveillance location, it has the burden to demonstrate that the privilege applies. That burden is satisfied by proof that the surveillance location was either on private property and used with the owner's permission or in a location where its future use would be compromised by disclosure.

2. The record was insufficient to allow the Appellate Court to review the trial court's reasons for denying a motion for disclosure of the secret surveillance location of an officer who testified that he observed a drug offense. When the motion for disclosure was filed, the trial court held an *in camera* interview of the officer. That proceeding was not transcribed, however, and defendant failed to ask the trial court to clarify its reasoning or state its findings with greater specificity.

Although surveillance location cases often involve *in camera* proceedings and incomplete records, it is the burden of the appellant to provide the reviewing court with a record that is adequate to support any claims of error. In the absence of an adequate record, all doubts are resolved against the appellant. In such cases, the trial court's ruling is presumed to have a sufficient legal and factual basis.

3. The court rejected defendant's argument that disclosure should have been ordered because without regard to the trial court's reasons for denying the motion, the conviction for possession of a controlled substance rested on the observations of a single officer. Although some precedent holds that disclosure must "almost always" be ordered where the State's case rests on a single officer, in those cases the officer's ability to observe the subject of the testimony was seriously questioned. Here, by contrast, the officer testified regarding several points, including his distance from defendant, vantage point, level of elevation, and ability to hear the offense. The officer also testified about the type of lighting and lack of any obstructions. Because the officer's ability to observe was not seriously called into question, the trial court did not abuse its discretion by denying the motion to disclose the exact surveillance location.

(Defendant was represented by Assistant Defender Caroline Bourland, Chicago.)

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§15-7

Police Reports

[In re C.J., 166 Ill.2d 264, 652 N.E.2d 315 \(1995\)](#) The Court rejected the argument that loss of evidence in Department of Children and Family Services files can be imputed to the State's Attorney. Because child abuse has both criminal and social welfare implications, DCFS and the State's Attorney will frequently be involved in the same case. However, the mere fact that a criminal prosecution may result from an investigation does not impute knowledge of all DCFS records to the prosecutor. The Court concluded that DCFS is an agent of the prosecution only when it acts "at the behest of and in tandem with the State's Attorney," to help in the prosecutorial effort.

[People ex rel. Fisher v. Carey, 77 Ill.2d 259, 396 N.E.2d 17 \(1979\)](#) Defense counsel may properly obtain police reports by way of subpoena duces tecum. Furthermore, the State's Attorney is not the conduit for subpoenaed police reports and may not intercept such reports. The subpoenaed material should be sent directly to the court, which will determine whether the reports are relevant and material, whether they are privileged, and whether the subpoena is unreasonable or oppressive.

[People v. Nunez, 24 Ill.App.3d 163, 320 N.E.2d 462 \(1st Dist. 1974\)](#) Defendant was convicted of unlawful use of weapons after a gun was found under his bed. Defendant's mother testified that she found the gun outside of their apartment, took it inside, and called the police to report the gun. The police did not respond to the call. Defense counsel sought police logs relating to this call but the trial court denied the defense request for inspection. The Appellate Court ordered the trial court to examine the logs and to grant a new trial if the logs revealed that a call for assistance was made.

[People v. Wilken, 89 Ill.App.3d 1124, 412 N.E.2d 1071 \(3d Dist. 1980\)](#) At trial, a police officer testified that he saw the defendant at the crime scene. Defense counsel moved for a mistrial because the police reports that had been disclosed indicated that defendant's presence at the scene would be proved only by the testimony of two co-defendants. Defense counsel stated that the "information in the report would have changed his cross-examination of (the officer) and could have prompted further investigation." The Appellate Court held that the State's failure to disclose the police report was reversible error. The officer "was the only non-co-defendant witness to place the defendant at the scene of the crime, and the jury, in disregarding the defendant's alibi defense, could have placed great weight on (the officer's) testimony.

[People v. Jenkins, 18 Ill.App.3d 52, 309 N.E.2d 397 \(1st Dist. 1974\)](#) The defense should have been allowed to inspect a store detective's report that was used to refresh her memory. There is no rational basis to justify a rule distinguishing between reports prepared by police officers and those prepared by officers employed by private corporations.

[People v. Curry, 167 Ill.App.3d 146, 520 N.E.2d 984 \(2d Dist. 1988\)](#) The State's failure to

produce a police report was reversible error. The report contained a statement of the defendant that was identical to his trial testimony. Another police report, which did not include part of defendant's later trial testimony, was introduced and used in closing argument to imply that defendant failed to mention certain things earlier and had fabricated part of his trial testimony. Since the outcome of the trial depended on the credibility of the witnesses, the undisclosed police report could have enhanced defendant's credibility and rebutted the prosecutor's claim of recent fabrication.

Cumulative Digest Case Summaries §15-7

[People v. Carballido, 2011 IL App \(2d\) 090340 \(No. 2-09-0340, mod. op., 8/10/11\)](#)

The court held that a post-conviction petition alleged the gist of a constitutional issue concerning a State investigator's failure to disclose field notes of his interview of a defense witness. The court noted that the failure to disclose material evidence after a defense request might violate due process. The witness testified at defendant's trial, and was impeached by the officer's testimony. Supreme Court Rule 412 requires the prosecution to insure a flow of information between various investigative personnel, so that the prosecutor obtains all information relevant to the case. Furthermore, [725 ILCS 5/114-13\(b\)](#) requires an investigating officer to provide the prosecutor with all investigative material, including field notes. Because the impeachment was on a critical point, and because the witness's testimony and the officer's impeachment were confusing concerning the precise content of the witness's out-of-court statement, the court directed the State to ensure that discovery requirements were completed before any proceedings occurred on remand.

(Defendant was represented by Assistant Defender Mike Vonnahmen, Springfield.)

[People v. Carballido, ___ Ill.App.3d ___, ___ N.E.2d ___ \(2d Dist. 2011\) \(No. 2-09-0340, 3/17/11\)](#)

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(Defendant was represented by Assistant Defender Mike Vonnahmen, Springfield.)

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§15-8

Physical Evidence, Photos, Documents, Test Results

[California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 \(1984\)](#) The defendants were arrested for drunk driving, and submitted to breath tests. On appeal, they argued that the results of the tests should not have been admitted because the officers failed to preserve the breath samples. The Supreme Court held that due process did not require that the State preserve the breath samples. The State did not destroy the breath samples in a calculated effort to circumvent disclosure requirements. Instead, the officers acted in accord with their "normal practices." The duty to preserve evidence "must be limited to evidence that might be expected to play a significant role in the suspect's defense" - that is, evidence which possesses "an exculpatory value that was apparent before the evidence was destroyed, and also of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."

[Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 \(1988\)](#) The State's failure to preserve evidence that is possibly useful to the defense does not deny due process unless the police acted in bad faith. Furthermore, the State is not required to test physical evidence with the most advanced techniques, but the failure to perform the most advanced or probative test may support a claim that the results are unreliable. See also, [In re C.J., 166 Ill.2d 264, 652 N.E.2d 315 \(1995\)](#); [People v. Lampkin, 193 Ill.App.3d 570, 550 N.E.2d 278 \(3d Dist. 1990\)](#).

[People v. Newberry, 166 Ill.2d 310, 652 N.E.2d 288 \(1995\)](#) Defendant was charged with unlawful possession of a "look-alike" substance with intent to distribute. When the substance was later tested in a laboratory and determined to be cocaine the State dismissed the "look-alike" charge and replaced it with counts relating to unlawful possession of a controlled substance. However, an evidence technician destroyed the substance in the mistaken belief that all charges had been terminated. Defense counsel had filed a written discovery motion, including a request to examine the substance, before the technician destroyed the substance. The trial court granted defendant's motion to dismiss the charges, holding that due process is violated where the State destroys an alleged controlled substance after the defense files a request for preservation. The Court rejected the State's argument that a failure to preserve evidence violates due process only if the police acted in bad faith. Although [Arizona v. Youngblood, 488 U.S. 51 \(1988\)](#), requires a showing of bad faith before the destruction of non-exculpatory evidence is a due process violation, **Youngblood** involved evidence that was only "potentially useful" to the defense (i.e., test samples and clothing in a sexual assault and kidnaping case). Where the destroyed evidence is "essential to and determinative of the outcome of the case," as where an alleged controlled substance is destroyed in a drug case, no showing of bad faith is required. Furthermore, where the defense specifically places the State on notice to preserve evidence, and the State nonetheless destroys the substance (even inadvertently), the defense need not "make an independent showing that the evidence had exculpatory value in order to establish a due process violation."

[People v. Holey, 182 Ill.2d 404, 696 N.E.2d 313 \(1998\)](#) The court rejected the State's argument that where undisclosed physical evidence has been destroyed, [Arizona v. Youngblood, 488 U.S. 51 \(1988\)](#) necessarily requires a showing of bad faith before a due process violation can be found. See also, [People v. Coleman, 307 Ill.App.3d 930, 718 N.E.2d 1074 \(2d Dist. 1999\)](#) (due process was violated where the State destroyed an alleged controlled substance after defendant filed a discovery motion. Compare, [People v. Johnson, 293 Ill.App.3d 915, 689 N.E.2d 179 \(1st Dist. 1997\)](#) (where the defense filed its discovery request more than four years after the

evidence was seized and only after the prosecutor informed the court that it had been inadvertently destroyed, reversal was required only if the State acted in bad faith).

[People v. Jordan, 103 Ill.2d 192, 469 N.E.2d 569 \(1984\)](#) At defendant's trial for murder, the State presented the testimony of forensic odontologists concerning their examination of the victim's jaw. The experts gave their opinions, based upon the so-called "pink tooth theory," that death had possibly been caused by strangulation. Defendant contended that he was denied due process because the victim's jaw was destroyed, preventing him from having the evidence independently examined. Relying on [California v. Trombetta](#), the Supreme Court held that the State's failure to preserve the jaw did not violate due process. See also, [People v. Emrich, 113 Ill.2d 343, 498 N.E.2d 1140 \(1986\)](#) (State's failure to preserve a blood sample in a DUI case was not a constitutional violation.)

[People v. Newbury, 53 Ill.2d 228, 290 N.E.2d 592 \(1972\)](#) The trial court allowed the defense to inspect crime scene photos which the State intended to introduce at trial, but denied the request to inspect other photos. Photographs are not automatically discoverable unless the State intends to use them at trial, they were obtained from the defendant, or they are favorable to the defense.

[People v. Robinson, 157 Ill.2d 68, 623 N.E.2d 352 \(1993\)](#) Defendant, an inmate, was seen in the area where the body of a prison employee was found. Defendant claimed that he heard the victim moaning and attempted to help her, but fled because he was afraid he would be blamed. Although the defense knew before trial that the State had gloves containing bloodstains consistent with the blood of the decedent, counsel believed there was no evidence linking defendant to the gloves. However, on the second day of trial, the State disclosed a report of a correctional officer who had found the gloves in defendant's possession. The correctional officer's name was disclosed several days before trial. Defendant moved to exclude the officer's report and testimony but the trial court denied this motion. The Supreme Court affirmed holding that defense counsel waived any issues concerning the discovery violation when he failed to request a continuance after the trial court denied the motion for exclusion of the testimony.

[People v. Walker, 257 Ill.App.3d 332, 628 N.E.2d 971 \(1st Dist. 1993\)](#) Defendant was convicted of robbery for allegedly seizing a wallet from a woman. The complainant described the person who seized the wallet as wearing a brown leather cap, a light-colored jacket and blue jeans. Although she identified defendant when he was brought to the crime scene minutes after the offense, the complainant stated that he was wearing different clothing and "had mud on him." A police officer who observed the incident and arrested defendant a short distance away testified that defendant was not wearing a hat or jacket. Defendant testified that when the officer yelled at him, he ran because he was carrying a knife. Defendant denied committing the offense and claimed that he had been on his way home when he was arrested. At trial, the State had disclosed that six weeks after the arrest (and eight months before trial), the police had destroyed a jacket, a hat, a knife, a gray suit and a pair of leather gloves. The Court held that the police had acted in bad faith and violated defendant's right to due process. Chicago police regulations allow property to be destroyed only after it is no longer needed as evidence, and a reasonably prudent police officer would not have decided six weeks after the arrest that the items would not be needed. This evidence would have played "a central role" in the claim that defendant had been misidentified, and it could not have been obtained through other

means.

[People v. Madison, 264 Ill.App.3d 481, 637 N.E.2d 1074 \(1st Dist. 1994\)](#) The trial judge should not have allowed the State to substitute a bag of sugar for the substance seized from the defendant. More than four years lapsed between the defendant's arrest and his trial. Approximately three weeks before trial, defense counsel sought the evidence seized from the defendant so that it could be tested by a defense expert. In response, the State disclosed that the substance had been erroneously destroyed some nine months earlier. The trial court denied a defense motion to dismiss the charge, and over defense objection permitted the State to substitute a bag of brown sugar as a demonstrative aid at trial. The Court concluded that the trial judge should have granted the motion to dismiss due to the State's destruction of the evidence. When the accused makes a timely request for independent testing of a controlled substance, the State must either produce a testable sample or show clearly and convincingly that destruction of the evidence was necessary. The destruction was clearly not "necessary" here, because a reasonable police officer would have realized that the substance would be needed as evidence at trial.

[People v. Julio, C., 386 Ill.App.3d 46, 897 N.E.2d 846 \(1st Dist. 2008\)](#) Supreme Court Rule 412(g) provides that where defense counsel makes a request to examine material that is in the possession of governmental personnel other than the prosecutor, and the material would be discoverable if in the prosecutor's possession, the State shall make diligent, good faith efforts to cause the material to be made available to defense counsel. Here, defense counsel filed a general discovery motion which did not specifically refer to a white Ford Explorer which had been involved in the offense, but which did ask for any "tangible object which was obtained from or belongs to the respondent or any co-respondent." In response, the State filed an answer asserting that all items set forth in the police reports, transcripts, and medical reports might be introduced as physical evidence, and would be made available for inspection upon defense counsel's request. In light of the State's assertion that all items set forth in the police report would be made available, the defense could reasonably expect the State to preserve the Ford Explorer. Thus, the trial court properly held that a discovery violation occurred when the State returned the Explorer to its owner, who sold it to a buyer in Mexico. However, where the discovery violation concerns evidence that is only "potentially useful," and the failure to preserve the evidence was not due to bad faith, due process is not violated. Examining the Ford Explorer would potentially have been useful to the defense, because impeaching evidence might have been obtained. However, the vehicle did not constitute exculpatory evidence and was not essential to determining the case. In addition, there was no evidence of bad faith on the part of the police. Under these circumstances, the trial court abused its discretion by dismissing the delinquency proceeding as a sanction for the State's discovery violation.

[People v. Crowder, 323 Ill.App.3d 710, 753 N.E.2d 1165 \(2d Dist. 2001\)](#) The Court affirmed the trial court's dismissal of two charges - unlawful use of a weapon by a felon and unlawful use of weapons - because the State destroyed the weapon in question before the defense had an opportunity to examine it. The court rejected the State's argument that dismissal of the charges was too "drastic" a sanction. To prove the elements of either crime, "the State was required to prove that the object allegedly possessed by the defendant was a firearm. The court stated: "[F]or all we know, the 'gun' seized from defendant could have been a toy, a nonfunctioning replica, or a 'piece of wood or soap.' Without being able to inspect the weapon and examine its outward appearance, defendant would not be able to refute in any meaningful

way the State's contention that it was a firearm."

[People v. Blaylock, 311 Ill.App.3d 399, 723 N.E.2d 1233 \(4th Dist. 2000\)](#) The State must preserve evidence that is "expected to play a significant role in a defendant's defense." However, dismissal of charges due to the State's failure to preserve evidence is appropriate only where the evidence has an "exculpatory value that was apparent before the evidence was destroyed . . . and . . . the defendant is unable to obtain comparable evidence by other reasonably available means." Where the State fails to preserve evidence that is only "potentially useful" to the defense, due process is violated only if the State acted in bad faith.

[People v. Hampton, 307 Ill.App.3d 464, 718 N.E.2d 591 \(1st Dist. 1999\)](#) The trial judge did not err by allowing an expert witness to testify that cocaine seized from the defendant's car was 81% pure, although the State failed to comply with a discovery request for the results of scientific tests. The judge allowed the defense to review the one-line report that had not been disclosed and examine the witness about the purity tests, and defendant did not claim that he could have challenged the tests. In addition, there was sufficient other evidence to establish that defendant's possession was with the intent to deliver. See also, [People v. Rubino & Williams, 305 Ill.App.3d 85, 711 N.E.2d 445 \(2d Dist. 1999\)](#) (the trial court abused its discretion by excluding a lab report. Exclusion was an unduly harsh sanction where the evidence was disclosed before trial, time was not of the essence, a continuance would have allowed defendants to review their trial strategy, and the defendants knew of the report's significance and needed only to be protected from any additional prejudice caused by the delay in disclosing its precise contents).

[People v. Garza, 92 Ill.App.3d 723, 415 N.E.2d 1328 \(3d Dist. 1981\)](#) Though a defendant has the constitutional right to conduct his own tests on physical evidence, this right is not without limitation. The State has an interest in preserving its evidence and insuring its admissibility, and defendant's right to inspect and test the physical evidence is not impaired by the State's delivery of items to its lab for initial testing.

[People v. Ross, 132 Ill.App.3d 498, 477 N.E.2d 1258 \(1st Dist. 1985\)](#) The defendant was not prejudiced by the failure of police to test the hands of defendant and the decedent for gunshot residue or by the failure to obtain sufficient blood samples from the scene to allow accurate testing.

[People v. McCabe, 75 Ill.App.3d 162, 393 N.E.2d 1199 \(5th Dist. 1979\)](#) Defendant requested all information in the possession of the State which tended to negate his guilt. The State possessed a composite sketch that the victim stated resembled the defendant, who was in the proximity of the crime scene. However, the State did not furnish the sketch or the police report until the afternoon of the first day of trial. The Court held that the "eleventh hour delivery of the thrice requested discovery items" violated due process and Supreme Court Rule 412.

[People v. Hall, 235 Ill.App.3d 418, 601 N.E.2d 883 \(1st Dist. 1992\)](#) Two interviews of an important prosecution witness had been tape-recorded by a California police officer. The State failed to tender the tapes to the defense and claimed they had been lost. The Court did not condone the State's failure to preserve evidence, but found there was a strong likelihood that written summaries of the interviews were accurate and there was no showing that the State had destroyed the tapes wilfully. Moreover, defense counsel did not seek to interview the relevant witnesses, the trial court allowed great latitude in cross-examination, and the evidence

was overwhelming.

[People v. Danielly, 274 Ill.App.3d 358, 653 N.E.2d 866 \(1st Dist. 1995\)](#) As a matter of dicta, the Court held that where the State has failed to preserve evidence the following non-IPI instruction should be given upon the defendant's request:

"If you find that the State has allowed to be destroyed or lost any evidence whose content or quality are in issue, you may infer that the true fact is against the State's interest."

Cumulative Digest Case Summaries §15-8

[People v. Kladis, 2011 IL 110920 \(No. 110920, 12/30/11\)](#)

1. In [People v. Schmidt, 56 Ill.2d 572, 309 N.E.2d 557 \(1974\)](#), the court addressed the scope of discovery in a misdemeanor DUI case. It held that the State was statutorily required to furnish the defendant with a list of witnesses, any confession of the defendant, and the results of the breathalyzer test, as well as any evidence negating the defendant's guilt as required by [Brady v. Maryland, 373 U.S. 83 \(1963\)](#), and the DUI arrest report for use at trial to impeach the witness who prepared it.

Schmidt determined the scope of discovery by considering relevant decisions, statutes, custom, and practice as it existed in 1974. **Schmidt** did not create a rigid list of discoverable items that remains static and does not take into account fundamental changes occurring in law and society since that ruling. Rather, pretrial discovery presupposes a range of relevance and materiality that includes not only what is admissible at trial, but also that which leads to what is admissible.

Since [Schmidt](#), video recordings made by in-squad cameras in misdemeanor DUI cases have become as relevant to the issue of proving or disproving guilt as the materials delineated in [Schmidt](#). Use of video recordings as evidence at trial has become common and courts increasingly rely on video recordings to present an objective view of the facts in a case. Allowing their discovery furthers the objectives of discovery of enhancing the truth-seeking process, enabling attorneys to better prepare for trial, eliminating surprise, and promoting an expeditious and final determination of controversies in accordance with the substantive rights of parties.

Supporting the conclusion that video recordings are discoverable under **Schmidt** are recent legislative enactments. Illinois State Police squad cars are required to be equipped with both video and audio recording equipment, and such recordings must be stored for a period of 90 days before being destroyed. [20 ILCS 2610/30\(b\) and \(f\)](#). There is also a general requirement that all in-squad recordings made for a law-enforcement or investigative purpose be retained for a minimum of 90 days. If the recordings are made as part of an arrest and are evidence in any criminal, civil, or administrative proceeding, they cannot be destroyed except upon a final disposition and an order from the court. [720 ILCS 5/14-4\(h-15\)](#).

Therefore, under **Schmidt**, video recordings are discoverable in misdemeanor cases. When the State received written notice from the defendant five days after her arrest requesting production of the recording of her police encounter, filed in a civil summary suspension proceeding, the State should have taken appropriate steps to ensure that it was preserved.

2. The correct sanction to be applied for a discovery violation is a decision appropriately left to the discretion of the trial court, and its judgment shall be given great weight. An abuse of discretion exists only where the decision of the trial court is fanciful, arbitrary, or unreasonable to the degree that no reasonable person would take the view adopted by the trial

court.

Because the State took no immediate action on defendant's request for the recording, the recording was automatically purged per police departmental policy within 30 days of the arrest. As a sanction for failing to preserve the recording, the court barred the police officer from testifying to any of the events captured on the videotape. The video system began recording five seconds prior to activation of the squad car's emergency lights, and ended when the officer turned off his emergency lights prior to transporting defendant to the station. This sanction was narrowly tailored to bar the State from introducing testimony regarding what was contained in the video recording, and allowed the officer to testify to any observations of defendant prior to the start of the recording and after its end. The sanction was not disproportionate to the violation and did not constitute an abuse of the court's discretion.

People v. Lovejoy, 235 Ill.2d 97, 919 N.E.2d 843 (2009)

1. Supreme Court Rule 412 provides that the State must disclose to the defense "any reports or statements of experts, made in connection with the particular case, including the results of physical or mental examinations and of scientific tests, experiments, or comparisons, and a statement of qualifications of the expert." Discovery rules are intended to protect against surprise, unfairness, and inadequate preparation.

The State committed a discovery violation where it disclosed a forensic expert's report which stated that a particular sample was negative to a presumptive test for the presence of blood, but did not state the expert's belief that the result was a false negative or her conclusion that DNA extracted from the sample had come from blood. At trial, the expert testified that the substance was "apparent blood" and that the sample was part of a larger stain which contained the defendant's footprint in blood.

The court acknowledged that the State properly disclosed the report which it had, and expressed its belief that the report had not been manipulated to avoid giving the defense relevant information. However, "relevant information was left out of the report, and the information provided was misleading" because the expert disclosed the result of her testing but not that she intended to disregard that result and testify to the opposite conclusion.

The court rejected the State's argument that the defense should have inferred that the expert would testify as she did. "There is nothing 'logical' about an expert testifying to a conclusion that stands in complete opposition to the conclusion stated in her own official report." Furthermore, the State did not claim that it was unaware of the expert's undisclosed conclusions, elicited the testimony which contradicted the report, and initially claimed that it had disclosed the expert's expected testimony.

2. A discovery violation necessitates a new trial only if the defendant demonstrates prejudice from the violation and that the trial court failed to eliminate the prejudice. Several factors are considered, including the closeness of the evidence, the strength of the undisclosed evidence, the likelihood the prior notice would have helped the defense discredit the evidence, and the remedy requested by the defense when the violation was discovered.

The court concluded that the defendant was prejudiced by the discovery violation because the expert's testimony concerned the "lynchpin" of the State's case, the expert's surprise testimony was "devastating" to the defense, and defendant was deprived of the opportunity to argue that the expert's test results contradicted the results of testing by another State expert. Furthermore, had the full scope of the expert's intended testimony been disclosed, defendant could have obtained a defense expert to refute the expert's contention or could have chosen to pursue a different line of defense altogether.

Although the defense did not interview the expert before trial, it did take sufficient steps

to alleviate the prejudice once the discovery violation became known. The defendant sought a continuance to find an expert to refute the surprise testimony, and when that request was denied managed to obtain an expert before the next court date. However, the trial court refused to allow defendant to reopen his case to present the expert's testimony. Given the seriousness of the charge, the complexity of the evidence, and the fact that a continuance would have created no hardship, the court saw "no good reason why the trial court denied defendant's request for a continuance."

Defendant's conviction and death sentence were reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Kim Fawcett, Supreme Court Unit.)

People v. Baker, 2015 IL App (5th) 110492 (No. 5-11-0492, 2/6/15)

Under [Illinois Supreme Court Rule 415](#), evidence may be excluded as a sanction for a discovery violation. Factors to be considered in determining whether to exclude evidence include the effectiveness of a less severe sanction, the materiality of the witness's proposed testimony to the outcome of the case, any prejudice to the opposing party, and any evidence of bad faith. The imposition of a sanction for a discovery violation is reviewed under the abuse of discretion standard.

Where the defense produced an expert witness's revised report two days before jury selection was to commence, and the report contained statistical information which had not been disclosed previously, the trial court did not abuse its discretion by excluding the expert from testifying. Noting that the defense failed to make an offer of proof and that it was difficult to determine the value of the statistical evidence, the court stressed that the State indicated it would need additional time to prepare for cross-examination, 120 prospective jurors had been summoned to report in two days, and witnesses had been subpoenaed. In addition, the trial had previously been continued due to a last-minute decision by the defense team to present an insanity defense and defendant failed to establish that he was unfairly prejudiced by the exclusion of the expert's testimony. Under these circumstances, the trial court did not abuse its discretion by prohibiting the testimony.

(Defendant was represented by Assistant Deputy Defender Amanda Horner, Mt. Vernon.)

People v. Faber, 2012 IL App (1st) 093273 (No. 1-09-3273, 6/26/12)

1. [725 ILCS 5/107A-5\(a\)](#) provides that all lineups must be photographed, and that such photographs and any photographs shown to eyewitnesses during photo spreads must be disclosed during discovery. Section 107A-5 was violated where defense counsel requested a photo array that had been shown to eyewitnesses, but the State could not tender a copy of the array because it had been lost after a co-defendant's trial.

2. As a matter of first impression, the court concluded that although §107A-5 was violated, suppression of testimony concerning the photo array was not mandated. The court found that §107A-5 is directory rather than mandatory.

Statutory language is presumed to be directory unless: (1) the statute prohibits further action in the event of noncompliance, or (2) the right protected by the statute would be harmed under a directory reading. The statutory language of §107A-5 does not prohibit further proceedings in the event the State fails to disclose a photo array. Furthermore, although the statute is intended to protect a fair trial, admission of a suggestive photo array constitutes reversible error only if the defendant was prejudiced.

Because defendant gave a statement admitting that he had been the shooter, and he was

identified as the shooter by two eyewitnesses, the court concluded that there was at most minimal prejudice from the admission of testimony concerning the photo array. Because the right to a fair trial was not affected by the failure to disclose the array, a directory reading of §107A-5 was appropriate.

The court noted, however, that the State's failure to preserve the photo array was "very disturbing." Furthermore, in a case in which the evidence in a case is closely balanced, "it may be that the correct remedy is to suppress the identification testimony."

3. The court rejected defendant's argument that apart from §107A-5, as a matter of common law the trial court should have suppressed testimony concerning the lost photo array and the subsequent lineup identifications. The mere fact that the photographs were lost does not justify reversal of the conviction; unless bad faith is shown, the failure to preserve potential evidence does not deny due process. Instead, the relevant question is whether under the totality of the circumstances the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

The trial court found that the loss of the photo array was inadvertent, and that the State diligently attempted to track down the array once it was discovered to be missing. In addition, there was testimony that the array was composed of similar-sized photographs of males of the same age and general appearance as the defendant. The court concluded that under these circumstances, the trial court's finding upholding the identification procedure was not against the manifest weight of the evidence.

Defendant's convictions were affirmed.

(Defendant was represented by Assistant Defender Kerry Goettsch, Elgin.)

[People v. Kladis](#), 403 Ill.App.3d 99, 934 N.E.2d 58 (1st Dist. 2010)

The failure of the prosecution to preserve potentially useful but not material exculpatory evidence does not violate due process unless the defendant can show bad faith by the prosecution. [Illinois v. Fisher](#), 540 U.S. 544 (2004). Separate and distinct from a due process violation, the court can order sanctions against the prosecution for its failure to comply with a discovery rule or order, but any sanction ordered must be proportionate to the magnitude of the discovery violation. Supreme Court Rule 415(g)(i).

Five days after defendant's arrest for misdemeanor DUI, the defense moved for production of any videotapes pertaining to the arrest pursuant to Supreme Court Rule 237, in conjunction with a motion to rescind the suspension of her license for refusal to submit to a breathalyzer. The defense served the motions on the State. At the first court appearance a month after the arrest, the defense made an oral motion for discovery of the tape pursuant to [People v. Schmidt](#), 56 Ill.2d 572, 309 N.E.2d 557 (1974).¹ The State confirmed with the arresting officer that there was a tape of the arrest, and the State agreed to produce it. Unbeknownst to the State, the tape had been destroyed earlier that day pursuant to police department policy to destroy tapes after 30 days. The circuit court ultimately found an absence of bad faith by the State, but ordered that the State be precluded from presenting any testimony regarding the events recorded on the tape as a sanction for the discovery violation.

The Appellate Court found that the State had committed a discovery violation per

¹ In [Schmidt](#), the court held that in a misdemeanor prosecution for DUI, the defendant was entitled to a list of witness, defendant's confession, any evidence negating guilt, the results of the breathalyzer, and the police report for use as impeachment at trial during cross-examination.

Schmidt. The defense was entitled to production of the tape to use on cross-examination of the arresting officer as impeachment. The State was on notice five days after the arrest that the defense wanted the tape and should have taken appropriate action to ensure the tape was not destroyed. It was irrelevant to the circuit court's exercise of its discretion to sanction the discovery violation that the tape was not material exculpatory evidence. The sanction ordered by the circuit court was proportionate to the magnitude of the discovery violation. The State was not barred from prosecuting the defendant or presenting testimony of the arresting officer regarding events not depicted on the tape.

[People v. Moravec, 2015 IL App \(1st\) 133869 \(No. 1-13-3869, 11/3/15\)](#)

1. In [People v. Kladis, 2011 IL 110920](#), the Illinois Supreme Court held that the trial court properly barred the State from presenting testimony about defendant's traffic stop as a discovery sanction where the State destroyed videotape of the stop. The court held that the State's failure to preserve and produce the video recording constituted a discovery violation since the recordings were a routine and integral part of traffic stops and objectively documented the stop by recording the conduct and words of both parties. The video recordings would have been admissible and relevant evidence furthering the truth-seeking function of trial.

2. Here the police stopped defendant's car on June 6, 2012, and, suspecting that defendant was intoxicated, had him perform field sobriety tests. There were several police observational devices (PODs) in the area which together or individually would have recorded at least part of the traffic stop. The PODs retained their recordings for 15 days and then were erased.

On June 14, defendant served a subpoena on the Chicago police requesting all "audio and video tape recordings, including but limited to in-car and in-station videos" relating to the traffic stop. The police received the subpoena on June 15, and it was filed with the circuit court on June 19. On June 19, defendant filed a discovery motion, again requesting all "audio and video tape recordings, including but limited to in-car and in-station videos."

On June 29, the Chicago police responded to the subpoena by informing defendant that on-scene video was not retained at the district level and that defendant could request it from another division. On July 30, the police informed defendant that video from one of the PODs was unavailable because it had been erased. Ultimately, the State never produced any video from the scene.

The trial court granted defendant's motion in limine to preclude testimony by the police about the traffic stop, finding that there was no "legitimate basis for the tape not being available."

3. The Appellate Court affirmed the trial court's ruling, rejecting all of the State's arguments. First, the court rejected the State's claim that defendant never actually requested the POD video where his request specifically stated that it was "including but limited to in-car and in-station videos." The court held that this argument was contradicted by the record, since the State never claimed at trial that defendant did not request any POD video and the Chicago police responded to the subpoena by searching for the POD video and eventually replying that it had been overwritten.

Second, the court rejected the State's argument that no discovery violation occurred under **Kladis** because defendant never showed that the POD videos were materially exculpatory. The record established that the PODs would have captured at least part of the traffic stop and thus this video could have been potentially helpful to both parties and, as in **Kladis**, would have served the truth-seeking function of trial.

Finally, the court rejected the State's argument that the trial court abused its discretion

by excluding all police testimony about the traffic stop since the State did not willfully fail to comply with discovery. Supreme Court Rule 415(g)(i) authorizes the trial court to impose sanctions for the inadvertent failure to comply with discovery and allows the court to “exclude such evidence, or enter such other order as it deems just.” Here, the trial court gave due consideration to all the facts and the sanction it imposed was within the bounds of its discretion.

[People v. Moore, 2016 IL App \(1st\) 133814 \(No. 1-13-3814, 2/18/16\)](#)

1. At defendant’s trial, the State introduced the testimony of two witnesses who identified defendant in court. Both witnesses also viewed separate photo arrays. One picked defendant out of the array, while the other did not. By the time of trial, both arrays had been lost or destroyed, although there was no evidence the State had acted in bad faith by failing to preserve this evidence.

On appeal, defendant argued that he was denied his right to due process where the State had failed to preserve the photo arrays. The court disagreed, holding that since there was no evidence that the State had acted in bad faith and no evidence that the missing evidence would have been inherently exculpatory, defendant was not denied due process.

2. In [Arizona v. Youngblood, 488 U.S. 51 \(1988\)](#), the Supreme Court held that it is not necessarily a due process violation when the State fails to preserve evidence. When the missing evidence is not inherently exculpatory but is only potentially useful, the defendant must show the State acted in bad faith to establish a due process violation.

In [People v. Newberry, 166 Ill. 2d 310 \(1995\)](#), the Illinois Supreme Court held that the defendant did not need to show bad faith on the part of the State to establish a due process violation where defendant has made a discovery request and the destroyed evidence was essential to the outcome of the case.

In [Illinois v. Fisher, 540 U.S. 544 \(2004\)](#), the Supreme Court expressly disagreed with the reasoning in [Newberry](#), and re-affirmed that to establish a due process violation, the defendant must show that the State acted in bad faith, even if the defendant has made a discovery request and even if the destroyed evidence was essential to the outcome of the case. The only exception to the bad-faith requirement is where the evidence is materially exculpatory rather than simply potentially useful.

The Appellate Court noted that the Illinois Supreme Court had not yet addressed whether the holding in [Fisher](#) affected a due process analysis under the Illinois Constitution. But it agreed with previous Appellate Court decisions holding that there was no indication the Illinois Supreme Court intended to interpret the Illinois due process clause more broadly than the federal clause. Accordingly, **Fisher** was the controlling authority.

3. Here the photo arrays were only potentially useful, not materially exculpatory. And there was no evidence the State acted in bad faith by not preserving the evidence. Thus under **Fisher**, defendant could not show a due process violation.

[People v. Nunn, 2014 IL App \(3rd\) 120614 \(No. 3-12-0614, 10/31/14\)](#)

1. Due process requires that criminal defendants have a meaningful opportunity to present a complete defense. The trial court has inherent authority to dismiss charges where the failure to do so would result in the deprivation of due process. The denial of a motion to dismiss is reviewed for abuse of discretion.

Where law enforcement destroys or fails to preserve potentially useful evidence, due process is violated only if the defendant can demonstrate bad faith. When determining whether due process has been violated, courts should consider the degree of bad faith or negligence and

the importance of the lost evidence compared to the evidence that was introduced at trial. “Bad faith” implies “a furtive design, dishonesty or ill will.”

Whether police violated a duty to preserve evidence depends on whether they acted in good faith and according to normal practice, whether the evidence was significant in defendant’s defense, and whether the evidence was of such character that comparable evidence could not have been obtained by reasonable and available means.

2. While officers were arresting defendant on charges of aggravated battery of a peace officer and resisting arrest, several bystanders took video and still photographs on their cell phones. Several of the bystanders testified that they were told by officers they would go to jail unless they stopped recording the incident and erased the recordings they had already made. One of the officers testified that he believed the officers had authority to seize the phones, but that they lacked the manpower to do so. The trial court denied a motion to dismiss the charges due to a due process violation, finding that police did not act in bad faith by ordering the destruction of the videos or by failing to preserve them as evidence.

The Appellate Court reversed, finding that the officers acted in bad faith by ordering the bystanders to delete the recordings despite knowing that the bystanders were legally permitted to record the event and that the officers could seize the phones to preserve the videos for use as evidence. The court noted that even if the officers were correct that they lacked sufficient manpower to seize the phones, they were not justified in demanding that the bystanders delete the videos. Furthermore, even if the officers lacked sufficient manpower to seize the phones at the scene, they could have asked the bystanders to bring their phones to the police station after the arrest.

Because the recordings would have been material to defendant’s guilt or innocence in that they would have captured the actions of both defendant and the police, and because no comparable evidence was available, the court concluded that defendant was denied her due process right to a fair trial. The convictions were reversed.

(Defendant was represented by Assistant Defender Kerry Bryson, Ottawa.)

[People v. Olsen, 2015 IL App \(2d\) 140267 \(No. 2-14-0267, 6/5/15\)](#)

Section 30(c) of the State Police Act provides that in-car video recording equipment shall record activities outside a patrol case when an officer (1) is conducting an enforcement stop or (2) reasonably believes a recording may assist the prosecution, enhance safety, or for any other lawful purpose. [20 ILCS 2610/30\(c\)](#).

The police stopped defendant for a traffic violation and performed field sobriety tests on defendant. Although the in-car video was running, the officer, for safety reasons, conducted the sobriety tests in front of defendant’s car so that none of the tests were capable of being seen on the video recording. Defendant argued that the officer’s failure to record the sobriety tests amounted to “spoliation of evidence” by failing to “properly preserve evidence” as required by the statute. As a remedy for the discovery violation, defendant requested that the court suppress all of the officer’s observations during the tests.

The Appellate Court held that there was no discovery violation since the State fully complied with discovery by turning over the videotape. Although the field sobriety tests were not visible on the tape, there was no evidence that the officer conducted the tests in front of defendant’s car for any reason other than safety. The statute requires that traffic stops be recorded, but stops are conducted under a variety of conditions and there is no way for an officer to guarantee that all relevant facts will be recorded.

The trial court’s order suppressing the evidence was reversed and the cause remanded for further proceedings.

(Defendant was represented by Assistant Defender Jessica Arizo, Elgin.)

[People v. Taylor, 409 Ill.App.3d 881, 949 N.E.2d 124 \(1st Dist. 2011\)](#)

1. Supreme Court Rule 412(a)(iv) requires the State to disclose an expert's reports or statements made in connection with a case, and to include a statement of the expert's qualifications. The court concluded that the duty to disclose under Rule 412(a)(iv) did not apply to a doctor who testified as a treating physician rather than as an expert.

A. The standard of review for evaluating a discovery violation is abuse of discretion. An abuse of discretion occurs where the defendant is prejudiced by a discovery violation and the trial court fails to eliminate that prejudice. The purpose of discovery rules is to protect the defendant against surprise, unfairness, and inadequate preparation.

A discovery violation does not require a new trial unless the defendant carries his burden of showing prejudice. The failure to request a continuance is a relevant factor in determining whether the undisclosed evidence actually surprised or unduly prejudiced the defense.

B. Treating physicians are consulted for purposes of treatment, without concern whether litigation is pending or contemplated. Expert witnesses, by contrast, are retained to render an opinion concerning a matter in litigation. Although treating physicians may give opinions at trial, those opinions are developed in the course of treating the patient and not for the purpose of testifying. Whether a doctor is a treating physician or an expert depends on her relationship to the case, not on the substance of the testimony.

Here, the witness in question was a treating physician. The witness was the complainant's regular physician, and was contacted by the emergency room because the complainant needed to be admitted to the hospital. The witness treated the complainant while she was in the hospital and continued to see her every two weeks after she was discharged. Although the doctor consulted with specialists concerning the complainant's condition, and those specialists prescribed medications, the doctor did not testify concerning the diagnoses of the experts. Instead, the only opinion she gave was that the complainant had suffered a concussion. Under these circumstances, the witness was clearly a treating physician rather than an expert.

C. In any event, the defendant was not prejudiced by the physician's testimony or the State's failure to disclose her qualifications. The State disclosed the name of the doctor before trial, and informed the defense that she would be called as a medical doctor. The defendant had the complainant's hospital records before trial, and deposed the doctor before she testified. Under these circumstances, the defense had an adequate opportunity to obtain the doctor's qualifications and could not claim surprise.

2. Supreme Court Rule 412(a)(i) requires that upon written motion, the State must disclose the names and recorded statements of persons whom the State intends to call as witnesses. Defendant claimed that the State violated Rule 412(a)(i) by failing to produce reports which the treating physician sent to the complainant's employer concerning the complainant's inability to return to work.

The court found that no discovery violation occurred. First, there was no evidence that the State had access to the medical reports in question. Furthermore, the State did not rely on the medical reports in its case-in-chief; instead, the reports were first mentioned during the defendant's cross-examination of the doctor.

Even had Rule 412(a)(1) been violated, a new trial would not have been required where there was no surprise or undue prejudice. The failure to request a continuance is a relevant factor in determining whether testimony actually surprised or unduly prejudiced a party. Here,

defendant moved for a mistrial, but did not seek a continuance or recess to assess the importance of the records to his case. Furthermore, the defense knew of the witness before trial and deposed her in preparing for trial. Finally, defendant's cross-examination showed his awareness that the doctor had continued to treat the complainant following her discharge.

(Defendant was represented by Assistant Defender Melissa Chiang, Chicago.)

[People v. Voltaire, 406 Ill.App.3d 179, 941 N.E.2d 270 \(2d Dist. 2010\)](#)

In [Arizona v. Youngblood, 488 U.S. 51 \(1988\)](#), the United States Supreme Court found that in the absence of bad faith, due process does not require dismissal of criminal charges where the State destroyed evidence which could have been subjected to "potentially useful" testing. In [People v. Newberry, 166 Ill.2d 310, 652 N.E.2d 288 \(1995\)](#), however, the Illinois Supreme Court departed from **Youngblood** and concluded that where evidence was outcome-determinative, such as the suspected narcotic in a controlled substances prosecution, the charge should be dismissed even if the State did not act in bad faith. The **Newberry** court stressed that the defendant had no realistic hope of exonerating himself of a controlled substance violation if he was unable to have the substance tested by his own expert.

Here, the trial court dismissed controlled substances charges under **Newberry** after finding that the State had inadvertently destroyed suspected controlled substances upon the completion of a co-defendant's case.

1. The Appellate Court concluded that **Newberry** was based on federal constitutional law, as it did not specifically mention the Illinois Constitution. In addition, although Supreme Court Rule 415(g) authorizes the trial court to dismiss a charge as a sanction for a discovery violation, the trial court exercised its discretion here by expressly declining to impose any discovery sanction.

2. The Appellate Court found that if presented with the issue today, the Illinois Supreme Court would abandon **Newberry** in light of [Illinois v. Fisher, 540 U.S. 544, 124 S.Ct. 1200, 157 L.Ed.2d 1060 \(2004\)](#). (Agreeing with [People v. Kizer, 365 Ill.App.3d 949, 851 N.E.2d 266 \(4th Dist. 2006\)](#)). In **Fisher**, the Supreme Court clarified that a suspected controlled substance is at most "potentially useful evidence" to which the **Youngblood** rule applies. Thus, under the current state of the law the Illinois Supreme Court would hold that the inadvertent destruction of controlled substances does not require dismissal of the charges.

The trial court's order dismissing the charges was reversed and the cause remanded for further proceedings.

[People v. Wachholtz, 2013 IL App \(4th\) 110486](#) (Nos. 4-11-0486 & 4-11-0812 cons., 4/30/13)

By statute, the police are required to retain any audio or video recording of a traffic stop "made as part of an arrest" by squad cars equipped with recording devices, and such recordings may be destroyed only upon a final disposition and an order by the trial court. [720 ILCS 5/14-3 \(h-15\)](#). The statute is silent as to any remedy for its violation.

Defendant was stopped by the police because his car had no rear registration light. The police determined the defendant's driver's license had been revoked and recovered a glass pipe with methamphetamine residue from a "little flap" inside the driver's armrest during an inventory search of the car. Defendant contended both at the time of the arrest and at trial that he had recently purchased the car and was unaware of the presence of the pipe. The officer testified that defendant volunteered that he did not even know the "flap" was there, even though the officer had not told him that detail. Defendant did not dispute making that statement.

Defendant moved to suppress the arresting officer's testimony because the police failed

to preserve in-squad audio and video recordings of the stop, arrest, and search. The court denied the motion, concluding that the statute did not require preservation of the recordings. Even though the trial court misinterpreted the statute, the Appellate Court found the error harmless because defendant was not prejudiced by the absence of the recording at trial.

At trial, defendant only disputed that he knowingly possessed the controlled substance. He could not show that the recording would have assisting him in challenging the inference that he knowingly possessed the substance found in his vehicle. Moreover, defense counsel effectively challenged the arresting officer's testimony at trial by eliciting evidence that the police had destroyed the recording and asking the jurors to consider how they would view the situation if defendant had done the same. Therefore, the absence of the recording did not significantly hinder defendant's ability to present a defense.

(Defendant was represented by Assistant Defender Catherine Hart, Springfield.)

People v. Wright, 2012 IL App (1st) 073106 (Nos. 1-07-3106 & 1-07-3464 (cons.), 3/30/12)
725 ILCS 5/116-5(a) provides that “[u]pon motion by a defendant charged with any offense where DNA evidence may be material to the defense investigation or relevant at trial, a court may order a DNA database search by the Department of State Police.” The legislature's purpose in enacting §116-5(a) was to level the playing field by providing the defendant with the ability to investigate through a search of the Illinois DNA database of offenders by the state police. The statute does not require that the defendant show that the search will produce results that are in fact relevant to or admissible at trial. A court's ruling on the motion is reviewed for an abuse of discretion.

The primary evidence identifying defendant as the offender was a nine-loci match between his DNA profile and a male DNA profile derived from the complainant's rectal swab. The State's expert testified that he had never seen a nine-loci match that was not accurate. Defendant had made a pretrial request that a search be conducted of the Illinois DNA database to determine if any of the database's records matched another at nine or more loci. In support of that request, the defense offered a report showing that a search of Arizona's convicted-offender database revealed 120 nine-loci matches in a database of over 65,000 offenders.

The trial court abused its discretion in denying the motion. “A trial court cannot bar a defendant's access to evidence that has a good chance of creating a reasonable doubt in the jury's mind, in light of the facts and circumstances of the case and the other evidence that is likely to be admitted at trial. To do so would be to pervert the purpose of the statute and call into question the integrity of the criminal process.”

The court noted that not only did the Arizona study show that the requested search would have a good chance of leading to reasonable-doubt evidence, but that an actual study of the Illinois database did yield over 900 pairs of nine-loci matches in a database containing over 220,000 profiles. Further, these nine-loci matches were not actual matches when other loci in the 13-loci profiles were compared. It also noted that in light of the results of these searches, “some legal scholars and scientists have questioned whether the extraordinarily large figures used in court to estimate the probability of a nine-loci ‘match’ are ‘no better than alchemy.’”

Unlike a post-conviction request for DNA analysis, the defendant's assertion of a consent defense at trial did not defeat his request for a §116-5(a) DNA database search. Statements by defense counsel in argument to the jury conceding that defendant had committed the acts at issue also did not amount to judicial admissions that would excuse the State from proving defendant's identity as the perpetrator at trial. A finding that defendant made a judicial admission would “turn a blind eye” to the reality that defendant was faced with evidence of a DNA match, a type of evidence that juries and courts alike find highly persuasive. The trial

court's denial of his motion for a search of the DNA database for nine-loci matches denied defendant the ability to develop a defense to this evidence. It would be absurd in these circumstances to criticize defense counsel for resorting to a consent defense.

(Defendant was represented by Assistant Defender Scott Main, Chicago.)

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§15-9

Transcripts of Prior Proceedings

[Britt v. North Carolina, 404 U.S. 226, 92 S.Ct. 431, 30 L.Ed.2d 400 \(1971\)](#) The State must provide an indigent defendant with a transcript of prior proceedings, such as a mistrial, when that transcript is needed for an effective defense or appeal.

[People v. Russell, 7 Ill.App.3d 850, 289 N.E.2d 106 \(1st Dist. 1972\)](#) An indigent defendant was entitled to the transcript of the prior trial of co-defendants.

[People v. Wolff, 75 Ill.App.3d 966, 394 N.E.2d 755 \(3d Dist. 1979\)](#) Trial court did not err by denying defendant's motion for a free transcript of a previous mistrial. Defendant did not allege an equal protection violation, the transcript was not needed to vindicate any legal right, and the motion was untimely because it was made on the eve of trial.

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§15-10

Disclosure by Defendant

[Wardius v. Oregon, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 \(1973\)](#) The defendant has the right to reciprocal discovery when disclosing an alibi defense. See also, [People v. Fields, 59 Ill.2d 516, 322 N.E.2d 33 \(1974\)](#); [People v. Cline, 60 Ill.2d 561, 328 N.E.2d 534 \(1975\)](#).

[Taylor v. Illinois, 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed.2d 798 \(1988\)](#) The Court upheld a ruling, which prohibited a certain defense witness from testifying because of defense counsel's discovery violation. Defense counsel had interviewed the witness a week before trial, and amended his list of witnesses on the first day of trial without listing the witness. Defense counsel only brought the witness to the attention of the court after the State's principal witnesses had testified. The Supreme Court stated that "it is plain that this case fits into the category of willful misconduct in which the severest sanction is appropriate." See also, [People v. Morgan, 142 Ill.2d 410, 568 N.E.2d 755 \(1991\)](#) where the Court held that the trial judge did not err in precluding testimony from a defense witness who was not disclosed to the State.

[People v. Fritz, 84 Ill.2d 72, 417 N.E.2d 612 \(1981\)](#) A defendant who presents an occurrence witness to testify that the defendant was not at the crime scene is not presenting an alibi defense, and is therefore not required to give notice of an alibi pursuant to Supreme Court Rule 413(d)(iii). The defendant did not present an alibi defense when his occurrence witness (his wife) volunteered that when defendant left the crime scene before the incident he "said he was

going to work."

[People v. Boclair, 129 Ill.2d 458, 544 N.E.2d 715 \(1989\)](#) The Court declined to reconsider its holding that the "work product" doctrine does not preclude discovery of a defense investigator's interview notes. Defendant also contended that such required discovery violates the right to effective assistance of counsel. The Court, however, found that the trial judge's in camera inspection of the notes safeguarded defendant's right to the effective assistance of counsel. The Court also rejected a claim that the discovery order violated the privilege against self-incrimination. The order only exposed to production material to which the State was entitled under the discovery rules.

[People v. Lee, 196 Ill.2d 368, 752 N.E.2d 1017 \(2001\)](#) Supreme Court Rule 413, which provides that a judicial officer may require an accused to submit to a reasonable physical or medical inspection of his body, does not authorize a psychiatric examination.

[People v. Sutherland, 223 Ill.2d 187, 860 N.E.2d 178 \(2006\)](#) Supreme Court Rule 416 provides that discovery depositions may be taken in capital cases with leave of the court, upon a showing of good cause. The trial judge did not abuse his discretion by denying a request to take a deposition of a witness who testified concerning DNA analysis. The trial court also did not err by allowing a defense investigator from defendant's first trial to be called by the State to rebut the testimony of an alibi witness at the second trial. Supreme Court Rule 412 provides that the defendant shall not be required to disclose legal research or other reports to the extent "that they contain the opinions, theories or conclusions of the State or members of its legal or investigative staffs, or of defense counsel or his staff." The "work-product" rule is intended to protect the mental processes of an attorney in preparing a client's case. Verbatim statements of witnesses do not fall within the scope of the work-product privilege. Thus, the investigator's oral testimony concerning her recollection of what an alibi witness said 15 years earlier was not protected by the work-product doctrine.

[People v. Sutton, 349 Ill.App.3d 608, 812 N.E.2d 543 \(1st Dist. 2004\)](#) The purposes of discovery are to eliminate surprise and afford the parties an opportunity to investigate. Sanctions for discovery violations are intended to accomplish these purposes rather than to punish the erring party. Although the trial court's choice of a discovery sanction will not be reversed on appeal absent an abuse of discretion, discovery sanctions must not encroach on the right to a fair trial. Here, the trial court erred by precluding independent DNA testing by the defense as a sanction for defense counsel's delay of seven months in requesting such testing. The court noted that the State was not prejudiced by the delay and did not object to defense counsel's motion. In addition, the case was still in the discovery stage at the time of defense counsel's request, and no trial date had been set. Finally, there was no allegation that defendant failed to comply with any discovery orders or that technical problems would be presented by independent testing. The court also concluded that counsel's delay in seeking testing was reasonable and that a defendant has the right to independently test tangible evidence. Finally, the testing performed by the State revealed possible discrepancies which additional tests would likely resolve.

[People v. Spiezer, 316 Ill.App.3d 75, 735 N.E.2d 1017 \(2d Dist. 2000\)](#) The court held that under the "work-product" doctrine the defense is protected from disclosing the report of a nontestifying, consulting defense expert. The court noted that the use of expert witnesses is

crucial to the defense's ability to prepare for trial, and that the purpose of the "work-product" doctrine is to protect materials prepared in anticipation of litigation. The "work-product" doctrine also prohibits the State from calling nontestifying defense witnesses. The court stated, however, that the doctrine is not absolute, and must yield if the State shows a special need for the expert's information.

[People v. Damico, 309 Ill.App.3d 203, 722 N.E.2d 194 \(2d Dist. 1999\)](#) Where there was no reason to believe that defense counsel's failure to disclose was intended to gain an advantage at trial, the trial judge erred by striking a third party's confession to the crime. Counsel learned of the confession only a few days before trial, and the witness was listed on defendant's discovery answers but the State chose not to interview her before trial. A delay to allow the prosecutor to interview the witness would have permitted the State to perform the same cross-examination as if the statement had been disclosed, and thereby cured any prejudice without hindering defendant's right to present a defense. See also, [People v. Houser, 305 Ill.App.3d 384, 712 N.E.2d 355 \(4th Dist. 1999\)](#) (trial judge erred by excluding the affirmative defense of necessity as a sanction for defense counsel's failure to comply with discovery rules).

[People v. Stack, 261 Ill.App.3d 191, 633 N.E.2d 42 \(4th Dist. 1994\)](#) Reversible error occurred where the trial court erroneously believed that it was required to bar defendant's self-defense claim as a sanction for a discovery violation. A trial judge may respond to a discovery violation by permitting discovery of the information, granting a continuance, excluding the evidence, or entering "such other order as it deems just under the circumstances." The judge's statement that he was "required" to exclude the evidence established that he failed to appreciate that he had discretion to permit defendant to raise the claim.

[People v. Foster, 271 Ill.App.3d 562, 648 N.E.2d 337 \(4th Dist. 1995\)](#) The trial court barred the defense from presenting any affirmative defenses because defense counsel had failed to file a discovery response. Defendant alleged in the post-trial motion that the trial court erred by refusing to allow him to present evidence of self-defense and at the sentencing hearing he testified that he had acted in self-defense. Although sympathetic with the trial court's frustration at defense counsel's failure to comply with discovery rules, "particularly in view of the prosecutor's un rebutted remarks which suggest compliance by defense counsel with discovery orders was an ongoing problem," the Court observed that the order prevented defendant from presenting any defense and therefore was the most serious sanction possible. When the defendant is not personally at fault for the failure to comply with discovery rules, the trial court should "punish the defending attorney directly and personally, and not . . . impose sanctions upon his client."

[People v. Brooks, 277 Ill.App.3d 392, 660 N.E.2d 270 \(1st Dist. 1996\)](#) Before trial, defendant filed several discovery answers indicating that he intended to raise an alibi defense. Francis Hawkins, the first witness called by the defense, was listed as a witness on at least one of the discovery answers. However, the address given for Hawkins in the alibi answer was "2946 West Lexington." At trial, Hawkins testified that at the time of the offense defendant was at a dinner party at "2858 West Lexington." The State objected to the alibi testimony on the basis of the incorrect address and argued that it should not be required to "play guess" as to "where he is." The trial court instructed the jury not to consider Hawkins' testimony and the judge also prohibited the witnesses, including the defendant, from testifying about the alibi. Defendant later testified and denied committing the offense. The trial judge abused his discretion by

excluding defendant's alibi defense as a sanction for a minor infraction of discovery rules. There was no evidence that the defense had attempted to mislead the prosecution or fabricate a defense. Because the violation was not wilful and the variance was of minor importance, the trial court abused its discretion by excluding all evidence of the alibi defense.

[People v. Dickerson, 119 Ill.App.3d 568, 456 N.E.2d 920 \(1st Dist. 1983\)](#) Five days before the scheduled date of defendant's trial, he notified the State of an alibi defense and three witnesses he intended to call. The State objected on the ground that the untimely notice was prejudicial to its case. The trial judge barred the defendant's alibi defense. The Appellate Court held that the above untimely notice of alibi was not the type of situation to warrant the strictest sanction. There was evidence that defendant and his counsel did not have a good relationship: defendant did not trust his lawyer and believed that early disclosure would weaken his case, and counsel informed the court of the alibi as soon as defendant told him of it.

[People v. Carrasquille, 174 Ill.App.3d 1023, 529 N.E.2d 603 \(1st Dist. 1988\)](#) The defendant sought to impeach the State's sole eyewitness with the inconsistent statements made during an interview with a defense investigator. The trial judge prohibited the defendant from using the defense investigator's notes or calling the investigator as a witness because the defense had failed to disclose the notes of the interview. The Court held that defense counsel should have disclosed the interview notes on the first day of trial and asked the judge to determine whether they were privileged. However, counsel's failure to disclose the notes did not warrant the severe sanction that was imposed, because a continuance would have protected the State from prejudice.

[People v. Grier, 90 Ill.App.3d 840, 413 N.E.2d 1316 \(1st Dist. 1980\)](#) At defendant's trial he raised the issue of the complainant's sobriety. The complainant testified that she had nothing to drink before the robbery, but two police officers had noticed the odor of alcohol on her breath. On cross-examination, one of the officers denied telling anyone that the complainant was drunk. The public defender who had represented defendant at the preliminary hearing testified that the officer told him that complainant "had been drinking and was drunk." On cross-examination, the public defender said that his notes concerning the conversation with the officer were in the possession of defendant's trial counsel. The prosecutor moved for production of the notes and the trial court ordered counsel to produce the excised portions of the notes. The notes were then used to impeach the public defender, because the notes did not indicate that the officer had used the term "drunk." The Court affirmed the order to produce, holding that even if the notes were part of the witness's "work-product" he waived the privilege by taking the stand and testifying about the conversation in which he took the notes.

Cumulative Digest Case Summaries §15-10

[People v. Ramsey, 239 Ill.2d 342, 942 N.E.2d 1168 \(2010\)](#)

Rule 415 authorizes the trial court to order sanctions for the failure to comply with discovery requirements, including ordering disclosure, granting a continuance, excluding evidence, or entering some other order which the judge deems just. The trial court's sanction for a discovery violation is reviewed for abuse of discretion. An abuse of discretion occurs where the trial court's decision is arbitrary, fanciful, or so unreasonable that no rational person would

agree with it.

The trial court did not abuse its discretion by excluding an expert's opinion at a death penalty hearing where the only evidence excluded was the expert's answer to one question, the jury was capable of determining the issue (whether defendant's "mental disorders" could be characterized as "mental disturbances") based on the testimony that was admitted, and the State would have been severely prejudiced had the answer been admitted because it would not have had a chance to secure its own expert.

Defendant's murder conviction and death sentence were affirmed.

(Defendant was represented by Assistant Defender Charles Hoffman, Supreme Court Unit.)

[People v. Baker, 2015 IL App \(5th\) 110492 \(No. 5-11-0492, 2/6/15\)](#)

Under [Illinois Supreme Court Rule 415](#), evidence may be excluded as a sanction for a discovery violation. Factors to be considered in determining whether to exclude evidence include the effectiveness of a less severe sanction, the materiality of the witness's proposed testimony to the outcome of the case, any prejudice to the opposing party, and any evidence of bad faith. The imposition of a sanction for a discovery violation is reviewed under the abuse of discretion standard.

Where the defense produced an expert witness's revised report two days before jury selection was to commence, and the report contained statistical information which had not been disclosed previously, the trial court did not abuse its discretion by excluding the expert from testifying. Noting that the defense failed to make an offer of proof and that it was difficult to determine the value of the statistical evidence, the court stressed that the State indicated it would need additional time to prepare for cross-examination, 120 prospective jurors had been summoned to report in two days, and witnesses had been subpoenaed. In addition, the trial had previously been continued due to a last-minute decision by the defense team to present an insanity defense and defendant failed to establish that he was unfairly prejudiced by the exclusion of the expert's testimony. Under these circumstances, the trial court did not abuse its discretion by prohibiting the testimony.

(Defendant was represented by Assistant Deputy Defender Amanda Horner, Mt. Vernon.)

[People v. Forrest, 2015 IL App \(4th\) 130621 \(No. 4-13-0621, 10/6/15\)](#)

1. Under Supreme Court Rule 413(d)(i), a criminal defendant is required to provide to the State the names and addresses of persons he intends to call as witnesses. Rule 415(g) authorizes the trial court to impose sanctions for a party's failure to comply with discovery rules, including granting a continuance, excluding the evidence, or entering any other order which the court deems just under the circumstances. The trial court's imposition of sanctions is reviewed for abuse of discretion. To exercise sound discretion, the trial court must consider available alternative sanctions.

When fashioning an appropriate sanction, the trial court should consider four factors: (1) the effectiveness of a less severe sanction, (2) the materiality of the proposed testimony, (3) the potential prejudice to the opposing party resulting from the testimony, and (4) whether the violation was committed in bad faith. Excluding testimony on behalf of a criminal defendant is reserved for the most extreme situations.

2. The trial court abused its discretion by excluding a defense witness's testimony as a sanction for defendant's failure to comply with the disclosure requirements of Rule 413. The Appellate Court stressed that the record did not indicate that the trial court considered any

alternative sanctions before barring the testimony. In addition, alternatives such as a continuance might have cured any prejudice from the violation by allowing the State to secure witnesses or interview the undisclosed witness, whom it had interviewed once before.

On appeal, the State argued that a continuance would have been inappropriate because the jury had been selected, a continuance would need to have been sufficiently long to allow the State to obtain additional witnesses, and it was unknown whether such witnesses were available. The court stated that those points should have been raised at the trial court level so the lower court could explicitly address them on the record. The court also noted that the record was insufficient to permit it to evaluate the State's claims at the appellate level.

The court also noted that Rule 415(g) permits the trial court to subject defense counsel to appropriate sanctions for willful discovery violations, and that the trial judge made no attempt to determine willfulness or whether a sanction against defense counsel would have been sufficient to punish the violation without barring defendant's witness.

The court also noted that the testimony was material to the defense because it showed that a critical State's witness had a motive to fabricate. Furthermore, the State would not have been prejudiced by admission of the testimony where it had already conducted a recorded interview with the witness and was not likely to be surprised by the testimony.

3. However, the court concluded that the error was harmless where the excluded testimony would have been cumulative and there was no reasonable probability that the jury would have acquitted had the testimony been admitted.

The convictions were affirmed.

(Defendant was represented by Assistant Defender Whitney Price, Chicago.)

[People v. Tally, 2014 IL App \(5th\) 120349 \(No. 5-12-0349, 5/21/14\)](#)

On the day his bench trial for aggravated battery was scheduled to start, defendant stated for the first time that he wanted to assert the affirmative defense of self-defense. The State objected, arguing that it had not prepared a rebuttal to that defense, and requested that the court bar any evidence of self-defense as a discovery sanction. When the defendant could not provide an adequate explanation for the delay in asserting self-defense, the court called the defendant's actions "trial by ambush," refused his request for a continuance, and barred the defense.

[Illinois Supreme Court Rule 413\(d\)](#) requires a defendant to inform the State of any affirmative defenses he intends to assert at trial. [Illinois Supreme Court Rule 415\(g\)\(i\)](#) gives the trial court authority to impose sanctions against a defendant who fails to disclose an affirmative defense. These sanctions include granting a continuance, excluding evidence, or any other order the court deems just.

The purpose of discovery rules is to prevent surprise or unfair advantage and to aid the search for truth. The purpose of discovery sanctions is to further the purpose of discovery, not to punish the offending party. Sanctions should not encroach on the right to a fair trial, and prohibiting a defendant from presenting his defense is a disfavored sanction since it does not further the goal of truth-seeking. Although the trial court's imposition of sanctions is reviewed for an abuse of discretion, precluding a defendant from presenting his defense is appropriate in only the most extreme situations and will be closely scrutinized on appeal.

The trial court should consider four factors in deciding whether to exclude defense evidence: (1) effectiveness of a less severe sanction; (2) materiality of the evidence; (3) prejudice to the State; and (4) evidence of the defendant's bad faith. Using these four factors, the Appellate Court concluded that the trial court abused its discretion in excluding defendant's affirmative defense.

First, granting a continuance would have provided an effective and less-severe sanction, allowing defendant to present his affirmative defense but also allowing the State time to prepare a rebuttal to that defense. Further, a continuance would have caused little inconvenience since the trial was only a one-day bench trial with only three citizen witnesses.

Second, evidence that defendant was acting in self-defense was material to his guilt or innocence. Third, any prejudice to the State could have been cured by granting a continuance. And fourth, the last-minute disclosure of the affirmative defense was not an act of bad faith or attempt at trial by ambush, since the defense was disclosed to the State before trial began and defendant himself requested a continuance so the State could prepare its rebuttal case.

Defendant's entire defense was based on a claim of self-defense. The trial court's sanction prevented defendant from presenting any defense, failed to promote the goal of truth-seeking, and was too severe in this case. The cause was remanded for a new trial.

(Defendant was represented by Assistant Defender Maggie Heim, Mount Vernon.)

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