

## DISCOVERY IN MARYLAND

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### I. DISCOVERY AT COMMON LAW

- A. No Right to Discovery. At common law, defendants in criminal cases had no right to pretrial discovery. *State v. Haas*, 188 Md. 63, 69 (1947), *overruled on other grounds, In re Petition for Writ of Prohibition*, 312 Md. 280, 305 (1988); *Goldsmith v. State*, 337 Md. 112, 121 (1995).
- B. Trial Court's Discretionary Power. A trial court has inherent discretionary power to compel disclosure of information in control of the State. *See McKenzie v. State*, 236 Md. 597, 602-03 (1964) (no abuse of discretion to deny request for disclosure at trial of written statements of prosecution witnesses, where no showing statements in fact existed or were material to case).
- C. Limitation on Discretionary Power. Trial courts lack power to compel State's witnesses to submit to pretrial depositions. *Tharp v. State*, 129 Md. App. 319, 341-42 (1999) ("Maryland courts have no inherent power to direct the taking of depositions in criminal cases; whatever power exists is conferred by Rule 4-261, which derogates the common law and must be strictly construed."), *aff'd*, 362 Md. 77 (2000) (depositions may be ordered when: (1) witness will be unable to attend trial or hearing; (2) testimony may be material; and (3) the deposition "is necessary to achieve justice."). *Accord* Maryland Rule 4-261. *Cf.* Md. Code Ann., Crim. Pro. § 11-304(d)(4) (2005 Supp.) (providing right to depose child when out of court statement admissible pursuant to statute).

### II. CONSTITUTIONALIZATION OF DISCOVERY

- A. General Rule: Subject to the exceptions set forth below, "there is no general constitutional right to discovery in a criminal case, and *Brady* did not create one." *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).

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B. Due Process Duty to Correct False Testimony.

1. This duty is the doctrinal precursor of *Brady v. Maryland*, 373 U.S. 83 (1963) -- opened door to notion that constitutional right to “fair trial” created a duty that (a) extended to the State as an entity, and not just prosecutor individually, and (b) included affirmative disclosures of known facts, rather than mere avoidance of affirmative misrepresentations by the State itself.
2. *Mooney v. Holohan*, 294 U.S. 103, 112-14 (1935). Clearest case of due process violation -- prosecutor intentionally presented testimony known to be false. Perjury at issue concerned substantive element of crime.
3. *Alcorta v. Texas*, 355 U.S. 28, 30-32 (1957); *Napue v. Illinois*, 360 U.S. 264, 269-72 (1959). Although prosecutor did not encourage perjury, he nevertheless had duty to correct it.
4. *Giglio v. United States*, 405 U.S. 150, 153-55 (1972). Prosecutor not aware that witness lied when he denied that testimony was obtained through promise of immunity. Another prosecutor involved earlier in case had promised immunity. Court held that knowledge of earlier prosecutor attributable to government as whole, so that State action denied defendant a fair trial when witness’s denial at trial was left uncorrected.
5. Modern partial codification: Rule 3.3 of Rules of Professional Conduct -- prohibits all counsel in both criminal and civil cases from offering evidence known to be false.

C. Duty to disclose evidence known to be favorable to the defendant that is material to guilt/innocence or to punishment.

1. *Brady v. Maryland*, 373 U.S. 83 (1963) -- procedural history: Death penalty case for robbery/felony-murder committed by Brady and accomplice Boblit. Brady admitted participation in robbery but sought to avoid death penalty by establishing that Boblit had killed victim; Brady had specifically requested before trial copies of all of Boblit’s extrajudicial statements. The one statement not produced was that in which Boblit confessed to the killings. The Court of Appeals of Maryland held non-disclosure denied due process and remanded case for retrial on punishment issue only.

2. *Brady* -- holding: The Supreme Court affirmed the ruling that a retrial was necessary as to punishment only. The Court announced a new rule of disclosure as follows: “We now hold that the suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.” 373 U.S. at 87.
3. Three components to a *Brady* claim: Evidence must be (1) suppressed by the State; (2) favorable to the accused; and (3) material.

D. Evidence must be suppressed by the State - suppressed evidence is information known to the prosecution but unknown to the defense

1. Information known to the State

a. The State has a duty to disclose evidence known to the prosecutor on the case, as well as other prosecutors in that office. *State v. Williams*, 392 Md. 194 (2006).

b. The prosecutor has a duty to learn of any favorable evidence known to others acting on the government’s behalf in the case. *Kyles v. Whitley*, 514 U.S. 419 (1995) ( police). *Compare Craig*, 76 Md. App. 250, 263-64 (1988) (therapy notes of county social worker deemed known to State), *rev’d on other grounds*, 316 Md. 551 (1989), *vacated*, 497 U.S. 836 (1990), *with Thomas v. State*, 372 Md. 342, 359 (2002) ( psychiatric hospital not state agency and its records do not fall within ambit of *Brady*); *Jones v. State*, 310 Md. 569, 587 (1987), (*vacated on other grounds*, 486 U.S. 1050 (1988)) (information obtained by federal prosecutors in course of independent investigation deemed not known to State).

2. Information unknown to the defense

a. *Brady* rule not intended “to displace the adversary system as the primary means by which truth is uncovered.” *United States v. Bagley*, 473 U.S. 667, 675 (1985). *Brady* offers a defendant no relief when the defendant knew or should have known of facts, or when a reasonable defendant would have found the evidence. *Ware v. State*, 348 Md. 19, 39 (1997).

b. Where defense did not receive a favorable document, but was aware of the specific information contained in it, there is no basis for reversal. *See Craig*, 76 Md. App. at 267-271. *See also Stewart v. State*, 104 Md. App. 273, 287 (1995) (where exculpatory information was in possession of defense witness, the witness was equally able to apprise the defendant as was the State), *aff'd on other grounds*, 342 Md. 230 (1996).

c. Merely because evidence is available through public records does not necessarily mean it is available to the defendant. *See Ware v. State*, 348 Md. at 39-40 (failure to disclose that prosecutor testified on behalf of State's witness was *Brady* violation even though information was matter of public record because information did not appear on docket entries, and defense counsel would have had to get the hearing transcribed).

d. *Open file discovery*. An open file discovery policy will help against a *Brady* challenge for obvious reasons. *See Gilliam v. State*, 331 Md. 651 686 (1993) (no suppression of evidence found where policy of State's Attorney's Office to give open file discovery, and documents in prosecutor's file, despite defense counsel's representation at post conviction that he did not recognize documents). Policy not helpful if *Brady* material is in police files, and not prosecutor files. *See Strickler v. Greene*, 527 U.S. 263, 283 ("if a prosecutor asserts that he complies with *Brady* through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under *Brady*"). *Accord Banks v. Dretke*, 540 U.S. 668, 693 (2004); *Conyers v. State*, 367 Md. 571, 603, *cert. denied*, 537 U.S. 942 (2002).

#### E. Evidence must be favorable to the defense

1. Evidence need not be exculpatory on merits; impeachment evidence can be deemed favorable. *Strickler*, 527 U.S. at 280 (duty to disclose such evidence applies even when not requested by accused, and encompasses impeachment evidence as well as exculpatory evidence). *Bagley*, 473 U.S. at 683-84; *Conyers v. State*, 367 Md. 571, 606 (2002); *Wilson v. State*, 363 Md. 333 (2001); *Ware*, 348 Md. at 37. Evidence that simply negates factors relied upon by State as connecting defendant with crime may also be deemed favorable. *Patler v. Slayton*, 503 F.2d 472, 478-79 (4th Cir. 1974). *Cf. Craig*, 76 Md. App. at 267 (evidence that victim was sexually abused by persons *in addition to* defendant does not negate guilt).

2. Not all suppressed evidence is favorable. *See Pantazes v. State*, 141 Md. App. 422, 446 n. 8 (2001) (failure to disclose results of witness’s voice stress analysis not *Brady* violation because, in addition to the fact that the information was ultimately disclosed during trial, see *G. supra*, evidence not favorable to accused when analysis concluded that witness not deceptive), *cert. denied*, 368 Md. 241 (2002).

3. *Brady* covers evidence to impeach trial testimony; it has not been construed to cover evidence useful to discredit hearsay declarant. *Adams v. State*, 165 Md. App. 352, 380-83 (2005). Although *Brady* requires disclosure of an agreement with a witness, *Conyers*, 367 Md. at 607; *Ware*, 348 Md. at 41; *Wilson*, 363 Md. at 348, it does not cover a witness’s unilateral subjective expectation of leniency, *Adams v. State*, 165 Md.App. at 416-17.

F. “Materiality” under the Brady doctrine.

1. If a conviction is obtained by the knowing use of perjured testimony, it must be set aside if there is *any reasonable likelihood* that the false testimony could have affected the judgment of the jury. *United States v. Agurs*, 427 U.S. 97, 103-07 (1976).
2. When there is no perjured testimony, but a failure to disclose favorable evidence, evidence will be deemed material if there is “a reasonable probability that, had the evidence been disclosed to the defense, the result . . . would have been different.” *Bagley*, 473 U.S. at 682-83; *Conyers*, 367 Md. at 610.
3. In *Kyles v. Whitley*, 514 U.S. 419 (1995), the Supreme Court emphasized four aspects of the materiality concept under *Bagley*.
  - a. “[A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant’s acquittal. . . . The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” 514 U.S. at 434.
  - b. *Bagley* materiality is not a sufficiency of evidence test. “A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there

would not have been enough left to convict.” 514 U.S. at 434-35.

- c. Once a reviewing court applying *Bagley* has found constitutional error, there is no need for further harmless error review. 514 U.S. at 435. *See also DeLuca v. State*, 78 Md. App. 395, 435-37, *cert. denied*, 316 Md. 549 (1989).
  - d. Suppressed evidence is considered collectively, not item by item. 514 U.S. at 436. *See Ware*, 348 Md. at 54.
4. The factors to consider in assessing materiality are: (1) the specificity of the defense request for disclosure; (2) the closeness of the case against the defendant and the cumulative weight of the other independent evidence of guilt; (3) the centrality of the particular witness to the State’s case; (4) the significance of the inducement to testify; and, (5) whether and to what extent the witness’ credibility is otherwise in question. *Grandison v. State*, 390 Md. 412, 433 (2005), The prosecutor’s emphasis on the witness’s credibility in closing argument is also relevant. *Wilson*, 363 Md at 352. *Accord Banks*, 540 U.S. at 700; *Strickler*, 527 U.S. at 295.
  - a. If the defense has a *particularized demand*, materiality is more likely to be found, in part because non-disclosure is likely to cause defense to “abandon lines of independent investigation.” *Bagley*, 473 U.S. at 682. “Materiality” is weighed in terms of overall effect on defendant’s case, not just in terms of evidentiary value.
  - b. If the information is essentially duplicative of *similar evidence actually presented at trial*, not material. *See State v. Tichnell*, 306 Md. 428, 457-63, *cert. denied*, 479 U.S. 995 (1986). *Craig*, 76 Md. App. at 270-71. Same if other evidence overwhelmingly shows guilt. *Grandison*, 390 Md. at 437.
5. Evidence can be favorable, but not material. *See Wood v. Bartholomew*, 516 U.S. 1 (1995) (per curiam) (where suppressed polygraph results inadmissible, even for impeachment, not material); *Strickler v. Greene*, 527 U.S. at 294 (undisclosed documents impeaching eyewitness testimony not material); *Nero v. State*, 144 Md. App. 333, 366-67 (2002) (no reasonable probability of different result if provided with statement made to detective where defense in possession of police report containing information).

6. In Maryland, the “reasonable probability” standard has been interpreted as a “substantial possibility that . . . the result of [the] trial would have been any different.” *Grandison*, 390 Md. at 432; *Wilson v. State*, 363 Md. at 352 (had suppressed written plea agreements been provided prior to trial, there is a substantial possibility that the outcome of case would have been different); *see also State v. Thomas*, 325 Md. 160, 188-90 (1992) (had suppressed internal affairs police reports been disclosed, there is no substantial possibility that result of trial would have been any different), *cert. denied*, 508 U.S. 917 (1993); *cf. Bowers v. State*, 320 Md. 416, 425-27 (1990) (defining “substantial possibility” for purposes of evaluating ineffective assistance of counsel claims as “a standard that falls between ‘probable,’ which is less demanding than ‘beyond a reasonable doubt,’ and ‘might’ which is less stringent than probable.”).

G. *Timing.*

1. *See infra* discussion of Maryland Rule 4-263(e).
2. The *Brady* rule applies where evidence is suppressed. Where information is disclosed during trial, there is no *Brady* violation. *Adams*, 165 Md. App. at 421-422; *Pantazes*, 141 Md. App. at 446 n.8. *Accord Jones v. State*, 132 Md. App. 657, 675 (2000) (in case decided on Maryland discovery rule, court explained “[t]he *Brady* sin is hiding something and keeping it hidden, not hiding something temporarily in order to surprise someone with a sudden revelation.”), *cert. denied*, 360 Md. 487 (2000).
3. Only constitutional requirement is that disclosure be made early enough that defense can make effective use of it. *See Adams*, 165 Md. App. at 421-22 ([i]f defendant learns of the information before the conclusion of the trial, to wit, in time to use it, there has been no *Brady* suppression); *State v. Wadlow*, 93 Md. App. 260, 271-72 (1992) (no *Brady* violation where defendant was given information with ample time to present that information to jury), *vacated on other grounds*, 335 Md. 122 (1994); *see also United States v. Smith Grading & Paving, Inc.*, 760 F.2d 527, 532 (belated disclosure of exculpatory information not reversible error where information was put before the jury during cross-examination of the very first trial witness), *cert. denied*, 474 U.S. 1005 (1985); *United States v. Elmore*, 423 F.2d 775, 779 (4<sup>th</sup> Cir. 1970) (“disclosure to be effective must be made at a time when the disclosure would be of value to the accused.”), *cert. denied*, 400 U.S. 825 (1970);

4. Principle underlying *Brady* was “avoidance of an unfair trial to the accused.” Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant. *United States v. Ruiz*, 122 S.Ct. 2450 (2002).

H. Destruction of evidence as a possible *Brady* issue.

1. General Rule: The failure to preserve potentially exculpatory evidence does not rise to a due process violation unless the defendant can show bad faith. *Illinois v. Fisher*, 540 U.S. 544 (2004) (per curiam) (destruction of cocaine 11 years after defendant charged, in accordance with established procedures, not violation of due process); *Arizona v. Youngblood*, 488 U.S. 51 (1988) (negligent failure to preserve clothing for later semen testing not violative of due process); *California v. Trombetta*, 467 U.S. 479 (1984) (police not required to preserve breath samples of suspected drunk drivers).
2. No *Brady* violation from destruction of murder victim’s vehicle where State did not have, and never had, control over it. *Icgoren v. State*, 103 Md. App. 407, 448, *cert. denied*, 339 Md. 167 (1995).
3. No due process violation for nonproduction of evidence – here a jacket that had contained CDS – in absence of showing of intentional, bad faith destruction of evidence. *Patterson v. State*, 356 Md. 677, 694-99 (1999).

### III. MODERN STATE LAW DEVELOPMENTS

#### A. Rule 4-263 - Discovery in Circuit Court.

(a) **Disclosure Without Request.** Without the necessity of a request, the State's Attorney shall furnish to the defendant:

(1) Any material or information tending to negate or mitigate the guilt or punishment of the defendant as to the offense charged;

-- This category of mandatory disclosures covers those disclosures required under *Brady*, while eliminating the need under *Brady* for a defense request. *See Craig*, 76 Md. App. at 259. The existence of a defense request remains relevant, however, to the issue of materiality. *See DeLuca v. State*, 78 Md. App. 395, 430-35 (1989).

(2) Any relevant material or information regarding: (A) specific searches and seizures, wire taps or eavesdropping, (B) the acquisition of statements made by the defendant to a State agent that the State intends to use at a hearing or trial, and (C) pretrial identification of the defendant by a witness for the State.

-- Purpose of this subsection is to expedite pretrial suppression hearings by obligating the State to disclose results of its investigations early on, whether or not defendant has requested disclosure. *Warrick v. State*, 302 Md. 162, 170-71 (1985); *accord Baynor v. State*, 355 Md. 726, 735 (1999) (purpose of Rule to force defendants to file pre-trial motions).

-- "Relevance" in context of this subsection means information that either supports or undercuts any defense claim that the information should be suppressed. *Warrick v. State*, 302 Md. at 171.

-- The defense is not required to show that a discovery request was reasonable or that the item sought was material to the preparation of his defense, and State's compliance with the discovery rules is never discretionary. *Williams v. State*, 364 Md. 160, 170-71 (2001).

-- Defendant's statements "to a State agent" under this subsection include statements made to agents of any other State who participated in investigation. *Bailey v. State*, 303 Md. 650, 655-57 (1985) (involving predecessor version of Rule 4-263).

-- Defendant's "statements" do not include statements made to undercover police officer in the course of the crime. *Jennings v. State*, 303 Md. 72, 75-86 (1985) (involving predecessor version of Rule 4-263).

-- Defendant's declaration to a government agent after he had been arrested and was being transported to "lock-up" was a statement. *Thomas v. State*, 168 Md. App. 682, 689-90 (2006).

-- Under Maryland Rule 4-263 (a) (2) (B), trial court finding that the defendant's statement was made to his mother, albeit in the presence of a police officer, was not a statement to a state agent and disclosure was not required. *Holland v. State*, 154 Md. App. 351, 374-75 (2003).

-- Where State failed to comply with this subsection, trial court nevertheless properly admitted defendant's statements as violation did not clearly impair defendant's ability to litigate admissibility in suppression hearing. *Evans v. State*, 304 Md. 487, 501-02 (1985), *reconsideration denied*, *Foster v. State*, 305 Md. 306, *cert. denied*, 478 U.S. 1010 (1986).

-- State need not disclose verbatim account of custodial interrogation that results in oral inculpatory statement. *Baynor v. State*, 355 Md. at 737-38. Disclosure only need be simple but fair statement of relevant information. *Id.* at 737 (noting relevant information provided by copy of recorded statement disclosing when and where statement taken, persons present and recitation of waiver of rights). State need not disclose exculpatory statements later recanted because not relevant to inculpatory statement State intended to use at trial. *Id.*

-- Under Maryland Rule 4-263 (a) (2) (C), State's failure to provide complete and accurate information about police officer's surveillance observations regarding the extent to which the officer could identify the defendant was a discovery violation. *Williams*, 364 Md. at 178; *see also Collins v. State*, 373 Md. 130, 146-47 (2003) (State violated this rule by not providing prior inconsistent non-identification by an eyewitness who,

on night of the crime told police he saw nothing, but then eleven days later, positively identified defendant in photographic array); *Simons v. State*, 159 Md. App. 562, 574-75 (2004) (witness's pre-trial statement to police that defendant, who was previously known to witness, was near crime scene around the time crime was committed constituted pre-trial identification and should have been disclosed).

(b) **Disclosure Upon Request.** Upon request of the defendant, the State's Attorney shall:

(1) Witnesses. Disclose to the defendant the name and address of each person then known whom the State intends to call as a witness at the hearing or trial to prove its case in chief or to rebut alibi testimony;

-- By its terms, does not include witnesses whose testimony is not in support of State's case in chief or to rebut alibi. *See Hoey v. State*, 311 Md. 473, 488-90 (1988) (no duty to disclose psychiatrist whose trial testimony was solely to rebut plea of not criminally responsible).

-- As with all provisions of Rule 4-263, subject to State's right to obtain protective order under Rule 4-263(i). *See Coleman v. State*, 321 Md. 586, 603-04 (1991) (upholding protective order delaying disclosure to defense counsel and precluding disclosure to defendants).

-- State should make every effort to determine that addresses given are current. *Compare Tirado v. State*, 95 Md. App. 536, 546-47, *cert. denied*, 331 Md. 481 (1993) (although witness considered different address current residence, address given sufficient since only address State given and witness had not severed ties with that address and could have been contacted there), *with Mora v. State*, 123 Md. App. 699, 724-25 (1998), *aff'd on other grounds*, 355 Md. 639 (1999) (noting that State *may* have violated Rule by failing to give current addresses, but upholding finding of no prejudice), and *Fisher v. State*, 367 Md. 218, 265 (2001) (when trial court denied defendant's request for address of victim, based upon representations by the State that the victim did not want to speak with defense counsel, court properly exercised discretion by effectively granting a protective order *sua sponte*).

– State is not required “to furnish to a defendant the statements of victims or other witnesses to a crime.” *Bailey v. State*, 16 Md. App. 83, 112 (1972) (construing former Rule 728); *see also Hopkins v. State*, 19 Md. App. 414, 427 (1973) (under former Rule 728, this Court stated, “[t]he rule does not provide that the State must furnish to a defendant statements of witnesses.”), *cert. denied*, 271 Md. 738 (1974); *Cummings v. State*, 7 Md. App. 687, 691 (1969) (while rule requires State to provide names and addresses of its witnesses, it is not required to provide statements obtained from such witnesses); *Presley v. State*, 6 Md. App. 419, 430 (1967) (State not required to turn over substance of the testimony to be given by its witnesses), *aff’d on other grounds*, 257 Md. 591 (1970). *But cf. Hutchins v. State*, 339 Md. 466, 473 (1995) (must disclose reports made under (b)(4)).

(2) Statements of the defendant. As to all statements made by the defendant to a State agent that the State intends to use at a hearing or trial, furnish to the defendant, but not file unless the court so orders: (A) a copy of each written or recorded statement, and (B) the substance of each oral statement and a copy of all reports of each oral statement;

-- Scope of “statements” parallel to Subsection (a)(2)(B). *State v. Brown*, 327 Md. 81, 91 (1992). Purpose of disclosure is to force filing of motion to suppress, and State should err on side of disclosure in any case where reasonable possibility that statement was unlawfully obtained. *Id.* at 94.

-- State not required to disclose statements to one not a State agent or statements made to State agents during commission of crime. *Brown*, 327 Md. at 94 (noting that *Brown* voluntarily made statement in circumstances involving no interrogation or coercion); *see also McDowell v. State*, 31 Md. App. 652, 663 (1976) (admission by appellant to an individual, called as a State’s witness at trial, that he robbed a shoe store was not discoverable because “we have consistently held that the state is not obliged to furnish a defendant with the substance of statements given to non-state agents”), *cert. denied*, 278 Md. 727 (1976) ; *Funderburk v. State*, 12 Md. App. 481, 490-91 (1971) (admission by appellant to co-defendant’s mother that he held a knife to rape victim’s throat was not a statement to a State agent and not discoverable), *cert. denied*, 263 Md. 713 (1971); *Smith v. State*, 4 Md. App. 146, 153 (1968) (oral statement by appellant to his brother to “shut up or they would all get twenty years,” made in presence of the State’s

witness was not an oral statement involving a State agent)

-- State must disclose *substance* of oral statement, not all questions asked and the responses. *Baynor v. State*, 355 Md. at 737-38.

– State must provide a copy of a recorded statement, even if intend only to use the substance of the statement, not the recording itself, at trial. *Johnson v. State*, 360 Md. 250, 267 (2000).

(3) Statements of codefendants. As to all statements made by a codefendant to a State agent which the State intends to use at a joint hearing or trial, furnish to the defendant, but not file unless the court so orders: (A) a copy of each written or recorded statement, and (B) the substance of each oral statement and a copy of all reports of each oral statement;

-- Does not include former codefendant against whom charges have been dropped pursuant to plea agreement. *Whitehead v. State*, 54 Md. App. 428, 439-41, *cert. denied*, 296 Md. 655 (1983). If former codefendant is to testify as a witness, however, trial court must exercise its inherent common law power to compel disclosure of any recorded verbatim accounts of prior statements by the witness, such as an adopted written statement or grand jury testimony, if it has been recorded. *See id.*; *Aud v. State*, 72 Md. App. 508, 522-23 (1987), *cert. denied*, 311 Md. 557 (1988). *See infra* discussion of witness statement disclosure under *Carr v. State*, 284 Md. 455 (1979).

(4) Reports or statements of experts. Produce and permit the defendant to inspect and copy all written reports or statements made in connection with the action by each expert consulted by the State, including the results of any physical or mental examination, scientific test, experiment, or comparison, and furnish the defendant with the substance of any such oral report and conclusion;

-- Psychiatrist who treated defendant in his cell following suicide attempt was not an expert “consulted” by the State because tests made as part of duties as treating psychiatrist. *Hoey*, 311 Md. at 489.

-- State must disclose specified material from experts consulted by the State even if they were consulted only for possible rebuttal testimony. *Hutchins v. State*, 339 Md. at 474-75.

-- Reports of State experts who have conducted polygraph examinations,

whether of the defendant or a witness, and regardless of whether results exculpatory of accused's guilt, constitute "scientific tests" that must be disclosed. *Patrick v. State*, 329 Md. 24, 35 (1992); *see also Pantazes*, 141 Md. App. at 440 (even though the results of a lie detector or voice stress test are inadmissible, such tests are scientific tests and must be disclosed under the rule).

-- Chart prepared by shoeprint identification expert considered report subject to discovery. *See Miles v. State*, 88 Md. App. 248, 256, *cert. denied*, 325 Md. 94 (1991).

-- Procedures used by an expert are discoverable, and extends to written standard operating procedures to be employed by a State's drug analysis expert or lab, and, in this case, the calibration record for the equipment used in the case, and the proficiency testing record for the expert. *Cole v. State*, 378 Md. 42, 58-59, 68-69 (2003).

-- Testimony based on specialized knowledge, education, experience or training is considered expert testimony and State must comply with this rule for police as with other expert witnesses. *Ragland v. State*, 385 Md. 706, 725 (2005).

(5) Evidence for use at trial. Produce and permit the defendant to inspect, copy, and photograph any documents, computer generated evidence as defined in Rule 2-504.3(a), recordings, photographs, or other tangible things that the State intends to use at the hearing or trial;

-- By its terms, would appear to include even demonstrative evidence such as diagrams, etc.

-- Gives defendant right, subject to appropriate protective order, to have independent testing performed on gun (or controlled dangerous substance) to be used against him. *Mangum v. State*, 342 Md. 392, 401 (1996). But no requirement that expert be retained at State expense. *Byrd v. State*, 16 Md. App. 391, 394-96 (1992), *overruled on other grounds*, *Sparks v. State*, 91 Md. App. 35 (1992).

(6) Property of the defendant. - Produce and permit the defendant to inspect, copy, and photograph any item obtained from or belonging to the defendant, whether or not the State intends to use the item at the hearing or trial."

-- Self-explanatory. Unlike subsection (b)(5), this provision is not

limited to items to be presented at trial.

(c) **Matters not subject to discovery by the defendant.** This Rule does not require the State to disclose:

(1) Any documents to the extent that they contain the opinions, theories, conclusions, or other work product of the State's Attorney, or

-- Appears to codify civil work product doctrine of *Hickman v. Taylor*, 329 U.S. 495 (1947) and *United States v. Nobles*, 422 U.S. 225 (1975).

(2) The identity of a confidential informant, so long as the failure to disclose the informant's identity does not infringe a constitutional right of the defendant and the State's Attorney does not intend to call the informant as a witness, or

-- Subject to *Brady, Holohan*, and other constitutional limitations, this provision perpetuates the State's common law privilege against disclosure of confidential informants. *See, e.g., Vandegrift v. State*, 82 Md. App. 617, 632-33, *cert. denied*, 320 Md. 801 (1990).

-- Privilege limited by fundamental fairness requirements. Where disclosure of informant's identity, or contents of communication, is relevant and helpful to defense, or essential to fair determination of cause, privilege must give way. *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957); *Warrick v. State*, 326 Md. 696, 699 (1992). Court must balance the public interest in protecting the flow of information against the individual's right to prepare a defense, taking into consideration the crime charged, particular circumstances of case, possible defenses, possible significance of informer's testimony, and other relevant factors. The key element is the materiality of the informer's testimony to the determination of guilt, balanced against the State's interest. *Warrick*, at 701.

-- Although balancing test should always be applied, some generalities: 1) privilege ordinarily applies if informant mere "tipster" supplying lead but not present at crime, while disclosure usually required when informant participated in crime. *Warrick v. State*, 326 Md. at 701; 2) informer's identity could be vital if defense of entrapment, *Roviaro*, or mistaken identity, *Warrick; Brooks v. State*, 320 Md. 516, 526-27 (1990).

-- Same balancing test regarding disclosure for probable cause determination. *Edwards v. State*, 350 Md. 433, 445-47 (1998).

-- In camera examination of informant appropriate in applying balancing test. *Warrick v. State*, 326 Md. at 707-713.

(3) Any other matter if the court finds that its disclosure would entail a substantial risk of harm to any person outweighing the interest in disclosure.

-- For example of balancing employed in upholding protective order delaying disclosure, *see Coleman v. State*, 321 Md. 586, 602-04 (1991). The court should balance the materiality of the witness' testimony to the determination of the accused's guilt or innocence against the State's interest in protecting the identity of the witness. *Id.* at 603.

-- Court found no discovery violation in failing to disclose address of vulnerable and abused fifteen-year-old to defendants who abused her. *Fisher v. State*, 128 Md. App. 79, 129-30 (1999), *aff'd in part, vacated in part*, 367 Md. 218 (2001).

(d) **Discovery by the State.** Upon the request of the State, the defendant shall:

(1) As to the person of the defendant. Appear in a lineup for identification; speak for identification; be fingerprinted; pose for photographs not involving reenactment of a scene; try on articles of clothing; permit the taking of specimens of material under fingernails; permit the taking of samples of blood, hair, and other material involving no unreasonable intrusion upon the defendant's person; provide handwriting specimens; and submit to reasonably physical or mental examination;

(2) Reports of experts. Produce and permit the State to inspect and copy all written reports made in connection with the action by each expert whom the defendant expects to call as a witness at the hearing or trial, including the results of any physical or mental examination, scientific test, experiment, or comparison, and furnish the State with the substance of any such oral report and conclusion;

(3) Alibi witnesses. Upon designation by the State of the time, place, and date of the alleged occurrence, furnish the name and address of each person other than the defendant whom the defendant intends to call as a witness to show that the defendant was not present at the time, place, and date designated by the State in its request.

– if trial court determines defendant violated the rule, relevant factors to consider whether exclusion of alibi witness testimony is an abuse of discretion are: (1) whether the disclosure violation was technical or substantial; (2) the timing of the ultimate disclosure; (3) the reason, if any, for the violation; (4) the degree of prejudice to the parties respectively offering and opposing the evidence; and, (5) whether any resulting prejudice might be cured by a postponement and, if so, the overall desirability of a continuance. *Taliaferro v. State*, 295 Md. 376, 390-91, *cert. denied*, 461 U.S. 948 (1983).

-- State's narrowing of a request for alibi witnesses to a specific time, date, and place, is not the functionally equivalent of an answer to a properly filed bill of particulars. *Isley v. State*, 129 Md. App. 611, 618 (2000).

(4) Computer-generated evidence. Produce and permit the State to inspect and copy any computer-generated evidence as defined in Rule 2-504.3 (a) that the defendant intends to use at the hearing or trial.

(e) **Time for discovery.** The State's Attorney shall make disclosure pursuant to section (a) of this Rule within 25 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 4-213. Any request by the defendant for discovery pursuant to section (b) of this Rule, and any request by the State for discovery pursuant to section (d) of this Rule shall be made within 15 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 4-213. The party served with the request shall furnish the discovery within ten days after service.

-- Self-explanatory.

(f) **Motion to compel discovery.** If discovery is not furnished as requested, a motion to compel discovery may be filed within ten days after receipt of inadequate discovery or after discovery should have been received, whichever is earlier. The motion shall specifically describe the requested matters that have not been furnished. A response to the motion may be filed within five days after service of the motion. The court need not consider any motion to compel discovery unless the moving party has filed a certificate describing good faith attempts to discuss with the opposing party the resolution of the dispute and certifying that they are unable to reach agreement on the disputed issues. The certificate shall include the date, time, and circumstances of each discussion or attempted discussion.

-- Note that a motion to compel is incomplete absent a certificate of good faith efforts to resolve the dispute.

(g) **Obligations of State's Attorney.** The obligations of the State's Attorney under this Rule extend to material information in the possession or control of the State's Attorney and staff members and any others who have participated in the investigation or evaluation of the action and who either regularly report, or with reference to the particular action have reported, to the office of the State's Attorney.

-- In a case where a witness for the State in a homicide case had also been a narcotics informant in unrelated cases, the State's duty and obligation under Rule 4-263 (g), which implements *Brady*, is to provide exculpatory and mitigating material and information known, not only to the prosecutor in a given case, but also, to information possessed by other prosecutors in the same office. *Williams v. State*, 392 Md. 194, 210-11 (2006).

-- Despite the language of this provision, the Court of Appeals has held that the State is not obligated to disclose *Brady* materials obtained by federal agents conducting an independent investigation. *Jones v. State*, 310 Md. at 586-87, *vacated on other grounds*, 486 U.S. 1050 (1988); *see also Thomas v. State*, 168 Md. App. at 694 (statements made by appellant to FBI agent were not within State's disclosure obligation under Maryland Rule 4-263 (g) until the agent first "reported" to the State's Attorney). On the other hand, the Court has held that the State is obligated to disclose statements obtained by an officer in another state who

participated in questioning the defendant and returning him to Maryland. *Bailey v. State*, 303 Md. at 656-57.

(h) **Continuing duty to disclose.** A party who has responded to a request or order for discovery and who obtains further material information shall supplement the response promptly.

-- When State witness moves contemporaneously with commencement of trial, State had duty to disclose new address. *Tirado v. State*, 95 Md. App. 536, 547, *cert. denied*, 331 Md. 481 (1993).

-- State's disclosure of a statement the same day it first learned of it complied with Maryland Rule 4-263 (h). *Thomas v. State*, 168 Md. App. 682, 695-96 (2006).

(i) **Protective orders.** On motion and for good cause shown, the court may order that specified disclosures be restricted. If at any time during the proceedings the court finds that a party has failed to comply with this Rule or an order issued pursuant to this Rule, the court may order that party to permit the discovery of the matters not previously disclosed, strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances.

-- Protective orders are commonly used to ensure witness safety. *See Coleman v. State*, 321 Md. at 603-04.

-- When trial court denied defendant's request for address of victim, based upon representations by the State that the victim did not want to speak with defense counsel, court properly exercised discretion by effectively granting a protective order *sua sponte*. *Fisher*, 367 Md. at 265-67.

-- Sanctions for violation.

-- The determination of the proper sanction for a violation of the discovery requirements is a matter for the trial court's discretion. *Warrick*, 302 Md. at 173; *accord at Williams*, 364 Md. at 178; *State v. DeLeon*, 143 Md. App. 645, 669 (2002); *Rosenberg v. State*, 129 Md. App. 221, 259 (1999), *cert. denied*, 358 Md. 382 (2000).

– Factors to be considered in deciding whether to exclude specific evidence not disclosed include (a) whether the violation was technical or substantial; (b) the timing of disclosure; (c) the reason for the violation; (d) the degree of prejudice resulting from the violation; and (e) whether a continuance is desirable and would cure any prejudice. *Taliaferro v. State*, 295 Md. 376, 390-91, *cert. denied*, 461 U.S. 948 (1983) (involving defendant’s failure to make required disclosure of alibi witness).

– Defendants are not entitled to “windfall” remedy of total exclusion where prejudice has been minimal. *Ross v. State*, 78 Md. App. 275, 286-87, *cert. denied*, 316 Md. 365 (1989); *accord Jones v. State*, 132 Md. App. 657, 676-77, *cert. denied*, 360 Md. 487 (2000); *see also State v. DeLeon*, 143 Md. App. at 669 (reversing trial court’s dismissal of indictment because defendant was not prejudiced by the discovery violation); *Aiken v. State*, 101 Md. App. 557, 576-78 (1994) (where failure to provide pretrial disclosure of a medical report violated Rules 4-263 (b) (4) & (5), trial court did not abuse its discretion in permitting expert to testify regarding the report, where defendant was given opportunity to interview the expert prior to his testimony, offering to continue the case, and in permitting the rape victim to be recalled for purposes of further extensive cross-examination), *cert. denied*, 337 Md. 89 (1995).

B. Rule 4-262. Discovery in District Court.

(a) **Scope.** Discovery and inspection pursuant to this Rule is available in the District Court in actions for offenses that are punishable by imprisonment, and shall be as follows:

(1) The State’s Attorney shall furnish to the defendant any material or information that tends to negate or mitigate the guilt or punishment of the defendant as to the offense charged.

(2) Upon request of the defendant the State’s Attorney shall permit the defendant to inspect and copy (A) any portion of a document containing a statement or containing the substance of a statement made by the defendant to a State agent that the State intends to use at trial or at any hearing other than a preliminary hearing, and (B) each written report or statement made by an expert whom the State expects to call as a witness at a hearing, other than a preliminary hearing, or trial.

(3) Upon request of the State the defendant shall permit any discovery or inspection specified in subsection (d)(1) of Rule 4-263.

(b) **Procedure.** The discovery and inspection required or permitted by this Rule shall be completed before the hearing or trial. A request for discovery and inspection and response need not be in writing and need not be filed with the court. If a request was made before the date of the hearing or trial and the request was refused or denied, the court may grant a delay or continuance in the hearing or trial to permit the inspection or discovery.

(c) **Obligations of the State's Attorney.** The obligations of the State's Attorney under this Rule extend to material and information in the possession or control of the State's Attorney and staff members and any others who have participated in the investigation or evaluation of the action and who either regularly report, or with reference to the particular action have reported, to the office of the State's Attorney.

-- Rule essentially incorporates subsections (a)(1), (b)(2), and (b)(4) of Rule 4-263 (circuit court discovery) as primary discovery categories available to defendant in District Court.

C. Extension of Common Law Rules.

1. Rules 4-262 and 4-263 not exclusive. Rules 4-262 and 4-263 do not supersede or preempt trial court's inherent common law discretionary powers, which survive promulgation of Rules. *Carr v. State*, 284 Md. 455, 467 (1979).

2. Trial court obligated to compel production of witness statements at trial upon defense request.

-- Defendant's common law entitlement to disclosure of witness statements upon completion of witness's testimony on direct first recognized in *Carr v. State*, 284 Md. at 472-73. Jencks Act, 18 U.S.C. § 3500, emphasized as persuasive, but not controlling, authority. *Id.* at 461.

– Defendant must request statement for purposes of determining whether due process principles violated. *Jones v. State*, 310 Md. 569, 582-83 (1987), *vacated*, 486 U.S. 1050, *aff'd in part and vacated on other*

*grounds*, 314 Md. 111 (1988); *Carr*, 284 Md. at 472; *Butler v. State*, 107 Md. App. 345, 358 (1995); *Kanaras v. State*, 54 Md. App. 568, 575, *cert. denied*, 297 Md. 109 (1983).

– “Statement” under Maryland law, for these purposes, is one given by a witness under the circumstances set forth in Section 3500 of the Jencks Act, and includes: (1) a written statement made by said witness and signed or otherwise adopted or approved by him; (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury. 18 U.S.C. § 3500 (e) (1). *Jones v. State*, 310 Md. at 585-86.

-- Trial court may not screen witness statements to determine value for cross examination purposes. *Leonard v. State*, 46 Md. App. 631, 638-39 (1980), *aff'd*, 290 Md. 295 (1981) (*per curiam*); *see also Johnson v. State*, 360 Md. 250, 270 (2000) (“The determination of what material contained on the [recorded statement] is useful to the defense is best left to defense counsel and his or her client.”). “[A] defendant’s right, at trial, to inspect the prior statement of a State’s witness who has testified is not necessarily limited (1) by the rules pertaining to pretrial discovery, or (2) to statements that are merely exculpatory.” *Leonard*, 46 Md. App. at 637.

-- Discoverable witness statements include grand jury testimony, *Jones v. State*, 297 Md. 7, 14-15 (1983), provided that the proceedings have been transcribed, *Aud v. State*, 72 Md. App. 508, 523 (1987), *cert. denied*, 311 Md. 557 (1988).

-- Where the defendants seek a document that was not adopted or approved by the witness as his own statement and the statement represents a summary rather than a verbatim account of what was said, *Carr* does not require disclosure. *Bruce v. State*, 318 Md. 706, 724-25 (1990), *cert. denied*, 508 U.S. 963 (1993); *Collins v. State*, 318 Md. 269, 288-89 (1990); *Jones v. State*, 310 Md. 569, 584-86 (1987); *Aud*, 72 Md. App. at 523; *Whitehead*, 54 Md. App. at 440-41; *but see Butler*, 107 Md. App. at 359-60 (where the witness sought to be impeached is the interviewing officer himself, and where the case against an accused will rest in large part on the testimony of that interviewing officer, then

defense counsel will be entitled to review the prior statement, or report, written by that officer).

-- Where statements are not known to or in possession of prosecutor, or State authorities, *Carr* does not require disclosure. *Bruce*, 318 Md. at 725-26; *Blair v. State*, 130 Md. App. 571, 613 (2000).

-- Police officer statements to Internal Affairs Division of police department are in the possession of the prosecution for purposes of *Jencks/Carr* analysis and must be disclosed on request. *Robinson v. State*, 354 Md. 287, 312-13 (1999).