

# INVESTIGATION, DISCOVERY, AND DISCLOSURE IN CRIMINAL CASES: AN IOWA PERSPECTIVE

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## I. INTRODUCTION

Investigation and discovery in criminal cases can be divided into two areas: (1) the duty of defense counsel to investigate, and (2) the duty of the prosecution to disclose. The purpose of these coexisting duties is to ensure the accused a fair trial by uncovering weaknesses in the prosecution's case. If a jury is exposed to weaknesses within the case, it may be able to better evaluate the strength and quality of the evidence to which it is exposed. The first question addressed by this Article is the defense counsel's obligation to conduct an investigation.

The purpose of conducting an investigation is to discover information pertinent to the client's case. It makes little difference if the information is disclosed by the applicable rules of discovery, by the use of an investigator, or by any other means. Information may be divided into three areas: (1) information in the possession of the state, (2) information in possession of the defendant, and (3) information that may be developed through independent sources. The purpose of this Article is to explore the methods of investigation and discovery available in Iowa that help ensure the accused a fair trial.

Formal discovery is characterized as the use of pretrial motions, depositions, and other tools filed pursuant to the rules of criminal procedure in discovering potential evidence. The use of any other discovery device is designated as informal discovery.

The American Bar Association's defense function standards provide:

(a) Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

(b) Defense counsel should not seek to acquire possession of physical evidence personally or through use of an investigator where

defense counsel's sole purpose is to obstruct access to such evidence.<sup>1</sup>

The Iowa Rules of Professional Conduct provide the standard regarding competent representation: "A lawyer shall not . . . [h]andle a legal matter without preparation adequate in the circumstances."<sup>2</sup> Adequate preparation includes an investigation that fulfills the obligation of the counsel to provide effective assistance of counsel.<sup>3</sup>

## II. LISTING SOURCES OF INFORMATION

Developing a list of information that may be available in each case gives structure and focus to fact investigation and discovery. Information that may be available and potentially admissible includes:

- a. Audio and video surveillance tapes;<sup>4</sup>
- b. Logs of audio and video surveillance;<sup>5</sup>
- c. Agency reports, including applications, authorizations, affidavits, orders, interim reports, and final reports;<sup>6</sup>
- d. All search and seizure warrant applications, affidavits, warrants, returns and inventories from any searches, as well as any evidence seized;<sup>7</sup>
- e. Evidence of prior bad acts;<sup>8</sup>

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1. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, at Standard 4-4.1 (3d ed. 1993) [hereinafter ABA STANDARDS].

2. IOWA CODE OF PROF'L RESPONSIBILITY DR 6-101 (2002).

3. See *Brescia v. New Jersey*, 417 U.S. 921, 924 (1974) (discussing the importance of "careful investigation" as a component of adequate representation in the context of a claim for ineffective assistance of counsel) (quoting *Moore v. United States*, 432 F.2d 730, 735 (3d Cir. 1970)).

4. See IOWA R. CRIM. P. 2.14(2)(b)(1). This rule allows a court to enter an order permitting discretionary discovery of (1) items seized, and (2) items "which are within the possession, custody or control of the state, and which are material to the preparation of the defense, or are intended for use by the state as evidence at the trial, or were obtained from or belong to the defendant." *Id.*; see also *State v. Deering*, 291 N.W.2d 38, 39-41 (Iowa 1980) (admitting a film taken by a hidden motion picture camera); *State v. Goeders*, 423 N.W.2d 901, 903 (Iowa Ct. App. 1988) (admitting tapes and transcripts of recorded telephone conversations).

5. See IOWA R. CRIM. P. 2.14(2)(b)(1).

6. *Id.*

7. *Id.*

8. See IOWA R. EVID. 5.404(b). Evidence of prior bad acts is admissible if

- f. Audio recordings taken during conversations between law enforcement personnel and any witness;<sup>9</sup>
- g. Emergency (911) calls to any agency;<sup>10</sup>
- h. Dispatch tapes of any agency;<sup>11</sup>
- i. Criminal histories of the state's witnesses;<sup>12</sup>
- j. Reports of interviews with the defendant;<sup>13</sup>
- k. Grand jury testimony of the defendant;<sup>14</sup>
- l. Reports of interviews with codefendants, accomplices, or accessories listed as witnesses;<sup>15</sup>
- m. Reports of interviews with witnesses;<sup>16</sup>
- n. Items taken from the defendant;<sup>17</sup>

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the evidence offered is relevant to establish a legitimate issue in the case and if the probative value of the evidence outweighs the danger of unfair prejudice. *See, e.g.*, *State v. Plaster*, 424 N.W.2d 226, 228-31 (Iowa 1988) (finding no error in admitting evidence of prior sexual abuse that occurred in a manner similar to the victim's allegations, even though such evidence may not necessarily be offered to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident") (quoting IOWA R. EVID. 5.404(b)); *State v. Howell*, 557 N.W.2d 908, 911-13 (Iowa Ct. App. 1996) (holding that testimony that a criminal defendant charged with sexual abuse had previously sexually assaulted a woman was admissible pursuant to Iowa Rule of Evidence 404(b) and that the probative value of the prior conviction was not outweighed by the danger of unfair prejudice); *State v. Zeliadt*, 541 N.W.2d 558, 560-61 (Iowa Ct. App. 1995) (finding that evidence that a defendant accused of indecent exposure for riding a bicycle when nude was seen engaged in similar conduct eleven months prior was admissible because the evidence was relevant and there was clear proof the defendant committed the prior acts).

9. *See supra* note 4.

10. *Id.*

11. *Id.*

12. *Id.*

13. IOWA R. CRIM. P. 2.14(2)(a)(1) (allowing a criminal defendant to inspect and copy written or recorded statements made by the defendant).

14. *See id.* R. 2.14(2)(a)(1) (allowing a criminal defendant to inspect and copy the transcript or record of his or her testimony before a grand jury).

15. *See id.* R. 2.14(2)(a)(2) (limiting the discovery of codefendant statements to those that will be offered at trial, but making the disclosure mandatory upon request).

16. *See id.* R. 2.14(2)(b)(1).

17. *Id.*

- o. Books, papers, or documents;<sup>18</sup>
- p. Photographs;<sup>19</sup>
- q. Lineup procedures and photographic arrays;<sup>20</sup>
- r. Expert witnesses credentials and the bases for their opinion;<sup>21</sup>
- s. Laboratory reports, including:
  - 1. Fingerprint analysis;<sup>22</sup>
  - 2. Handwriting analysis;<sup>23</sup>

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18. *Id.*

19. *Id.*; see *State v. Aswegan*, 331 N.W.2d 93, 97 (Iowa 1983) (holding that the trial court's decision to admit photographs as evidence was not an abuse of discretion).

20. In order to exclude a lineup procedure or photographic array, the defendant must show: (1) the identification procedure was impermissibly suggestive, and (2) "there is 'a very substantial likelihood of irreparable misidentification.'" *Manson v. Brathwaite*, 432 U.S. 98, 116 (1977) (quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968)). The factors used in determining suggestiveness include: (1) "the opportunity of the witness to view the criminal at the time of the crime," (2) the witness's degree of attention, (3) the accuracy of the witness's "prior description of the criminal," (4) the degree of certainty demonstrated by the witness at the confrontation, and (5) the length of "time between the crime and the confrontation." *Id.* at 114; see also *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972) (listing same). Iowa courts apply the same analysis. See, e.g., *State v. Rawlings*, 402 N.W.2d 406, 407-08 (Iowa 1987) (analyzing the photographic identification procedure under the framework established in *Manson*); *State v. Nagel*, 458 N.W.2d 10, 12-13 (Iowa Ct. App. 1990) (determining that the photographic array was not impermissibly suggestive).

21. See IOWA R. CRIM. P. 2.14(2)(b)(2) (permitting the court to order the prosecution, upon the defendant's motion, to allow the defendant to "inspect and copy or photograph any results or reports of physical or mental examination, and of scientific tests or experiments, made in connection with the particular case, or copies thereof, within the possession, custody or control of the state"); see also IOWA R. CIV. P. 1.508(1)(a) (stating that "[a] party may through interrogatories require any other party to state the name and address of each person whom the other party expects to call as an expert witness at trial," and require the other party to state subject matter of the testimony, the expert's qualifications, and mental impressions and conclusions).

22. See *State v. Steffen*, 230 N.W. 536, 537 (Iowa 1930) (stating that fingerprints are an admissible form of evidence), *rev'd in part on other grounds*, *Grismore v. Consol. Prods. Co.*, 5 N.W.2d 646 (Iowa 1942).

23. See *Gilbert v. California*, 388 U.S. 263, 266 (1967) (holding that the taking of handwriting exemplars did not violate the defendant's constitutional rights); *State v. Entsminger*, 160 N.W.2d 480, 485 (Iowa 1968) (holding that taking a handwriting exemplar from a defendant does not violate defendant's Fifth Amendment privilege against self incrimination); *Nelson v. Nelson*, 87 N.W.2d 767, 770-71 (Iowa 1958)

3. Footwear comparisons and analysis;<sup>24</sup>
4. Voice comparisons and analysis;<sup>25</sup>
5. Blood component analysis;<sup>26</sup>
6. Blood splatter analysis;<sup>27</sup>
7. Saliva analysis;<sup>28</sup>
8. Hair comparisons;<sup>29</sup>

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(stating that the opinions of handwriting experts have probative value).

24. *See* State v. Bedwell, 417 N.W.2d 66, 69 (Iowa 1987) (stating that the comparison of footwear impressions left at a crime scene with abandoned sandals was useful for the jury); State v. Mark, 286 N.W.2d 396, 407-11 (Iowa 1979) (allowing expert testimony on footwear comparisons); State v. Nebinger, 412 N.W.2d 180, 190-91 (Iowa Ct. App. 1987) (upholding admission of footwear analysis and comparisons at trial).

25. *See* Stovall v. Denno, 388 U.S. 293, 302 (1967) (holding that a pretrial identification of the defendant's voice did not violate due process); State v. Walton, 424 N.W.2d 444, 446-47 (Iowa 1988) (holding that having the suspect call 911 for voice identification was not impermissibly suggestive); State v. Ripperger, 514 N.W.2d 740, 744 (Iowa Ct. App. 1994) (holding that the defendant's due process rights were not violated because the voice identification procedure used was not impermissibly suggestive).

26. *See* State v. Dulaney, 493 N.W.2d 787, 790-93 (Iowa 1992) (holding that the admission of defendant's blood sample did not violate due process even though the State destroyed the sample before the defendant had an opportunity to independently test it); State v. Klindt, 389 N.W.2d 670, 671-73 (Iowa 1986) (affirming admission of forensic serology identification evidence based on the genetic makeup of blood and tissues), *overruled on other grounds by* State v. Reeves, 636 N.W.2d 22 (Iowa 2001); State v. Mark, 286 N.W.2d 396, 412 (Iowa 1979) (stating that blood type identification was relevant).

27. *See* State v. Phams, 342 N.W.2d 792, 795 (Iowa 1983) (stating that expert testimony regarding blood patterns found on a chair at a crime scene was relevant to prove participation); State v. Hall, 297 N.W.2d 80, 85-86 (Iowa 1980) (holding blood stain analysis was sufficiently reliable to be admitted as evidence).

28. *See* State v. Ogilvie, 310 N.W.2d 192, 196 (Iowa 1981) (using a saliva test to explain inconsistencies in evidence); State v. Mark, 286 N.W.2d at 411-13 (establishing a foundation for the admission of a saliva test and finding the test relevant and material).

29. *See* State v. Liggins, 557 N.W.2d 263, 270 (Iowa 1996) (noting that the defendant offered evidence that a state expert spent one month examining the defendant's vehicle and found no hair or fibers connecting the vehicle with the victim); State v. Post, 123 N.W.2d 11, 17 (Iowa 1963) (admitting testimony that hair clippings were not dissimilar to the defendant's); Winchester v. Strottman, 535 N.W.2d 480, 481 (Iowa Ct. App. 1995) (holding the injury verdict was supported by ample evidence relying, in part, on the presence of the victim's hair in the defendant's vehicle).

9. Fiber analysis and fiber impression examination;<sup>30</sup>
10. Urine analysis;<sup>31</sup>
11. Breath test and analysis;<sup>32</sup>
12. Dental examination and bite mark comparisons;<sup>33</sup>
13. Sexual assault protocol examination and analysis;<sup>34</sup>

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30. See *State v. Liggins*, 557 N.W.2d at 270 (introducing the absence of fiber evidence to support the argument that the victim was not in the defendant's car); *State v. Harris*, 436 N.W.2d 364, 366 (Iowa 1989) (admitting evidence of vacuum sweepings from the defendant's vehicle, which produced fibers of the same diameter and color as those taken from crime scene); *State v. Post*, 123 N.W.2d at 17 (admitting FBI testimony stating that paint, wood, and dyed rabbit hair from the defendant's jacket were similar to those found at the crime scene).

31. See IOWA CODE § 321J.15 (2003) (“[E]vidence of the alcohol concentration or the presence of a controlled substance in the person's body substances at the time of the act alleged as shown by a chemical analysis of the person's . . . urine is admissible.”); *State v. Prouty*, 219 N.W.2d 675, 677 (Iowa 1974) (holding a urine test admissible even though a more accurate result could have been obtained by following additional procedures).

32. See IOWA CODE § 321J.15 (“[E]vidence of the alcohol concentration or the presence of a controlled substance or other drugs in the person's body substances at the time of the act alleged as shown by a chemical analysis of the person's . . . breath . . . is admissible.”); *California v. Trombetta*, 467 U.S. 479, 491 (1984) (holding that there is no duty on law enforcement agencies to “preserve breath samples in order to introduce the results of breath-analysis tests at trial”); *State v. Lindeman*, 555 N.W.2d 693, 695-97 (Iowa 1996) (holding that breath tests were admissible despite the officer's lack of specified training because the officer substantially complied with Iowa's implied consent law).

33. See *State v. Chatterson*, 259 N.W.2d 766, 768-69 (Iowa 1977) (affirming the trial court's admission of evidence showing multiple injuries to a child victim, including bite marks, as not prejudicial); *State v. Bennett*, 503 N.W.2d 42, 47 (Iowa Ct. App. 1993) (admitting a medical examiner's testimony concerning bite marks—along with bruises, contusions, and lacerations—on a murder victim's body on the basis that such evidence was highly probative of the defendant's malice).

34. See *State v. Knox*, 536 N.W.2d 735, 737-41 (Iowa 1995) (holding that the lower court's refusal to admit evidence that the victim had chlamydia, while the defendant did not, was not an abuse of discretion because the probative value of such evidence was “very weak” when a man has only a thirty percent chance of contracting the disease from a woman in a single act of intercourse); *State v. Howell*, 557 N.W.2d 908, 910, 913 (Iowa Ct. App. 1996) (admitting testimony from a criminologist that

14. Semen analysis;<sup>35</sup>
15. Clothing examination and analysis;<sup>36</sup>
16. Polygraph examinations;<sup>37</sup>
17. DNA analysis;<sup>38</sup>
18. Tool mark analysis;<sup>39</sup>
19. Soil examination and analysis;<sup>40</sup>
20. Ballistic examination and analysis;<sup>41</sup>

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pubic hairs recovered from the victim were similar to the defendant's and that DNA testing was performed on a semen sample recovered from the victim).

35. See *State v. Howell*, 557 N.W.2d at 913 (allowing testimony regarding the "DNA testing [that] was performed on a semen sample recovered from the victim"); *State v. Taylor*, 538 N.W.2d 314, 315 (Iowa Ct. App. 1995) (finding that blood and semen found at the defendant's apartment identifying the victim and the defendant was probative).

36. See *State v. Lamp*, 322 N.W.2d 48, 59-60 (Iowa 1982) (holding that clothing analysis was admissible despite chain of custody problems); *State v. Post*, 123 N.W.2d 11, 17 (Iowa 1963) (admitting FBI testimony that paint, wood, and dyed rabbit hair from the defendant's jacket were similar to those found at the scene).

37. See *State v. Connor*, 241 N.W.2d 447, 457 (Iowa 1976) ("[P]olygraph evidence may be admitted into evidence only by stipulation of the parties. Unstipulated polygraph evidence may not be admitted."); *In re S.J.M.*, 539 N.W.2d 496, 499 (Iowa Ct. App. 1995) ("Polygraph evidence is generally inadmissible in the absence of a stipulation by the parties.") (citing *In re A.D.L.*, 497 N.W.2d 178, 180 (Iowa Ct. App. 1992)).

38. See *State v. Williams*, 574 N.W.2d 293, 297-98 (Iowa 1998) (noting that "DNA testing is sufficiently reliable to be admitted into evidence"); *State v. McCurry*, 544 N.W.2d 444, 445-48 (Iowa 1996) (admitting a DNA report despite the defendant's hearsay objection that it was an "investigative report" under Iowa Rule of Evidence 803(8)(B) when the expert who prepared the report also testified); *State v. Brown*, 470 N.W.2d 30, 31-33 (Iowa 1991) (discussing the admissibility and reliability of DNA evidence).

39. See *State v. Wessling*, 150 N.W.2d 301, 304 (Iowa 1967) (discussing the testimony of an FBI agent who testified as an expert in tool mark identification); *State v. Lampson*, 149 N.W.2d 116, 117 (Iowa 1967) (noting that tool mark analysis revealed impressions made at the crime scene that were made by tools found in the defendant's automobile).

40. See *State v. Wessling*, 150 N.W.2d at 304 (noting that testimony was introduced which demonstrated that the soil found in the defendant's coat matched the soil near the scene of the crime).

41. See *State v. Lewis*, 514 N.W.2d 63, 66 (Iowa 1994) (noting that three weapons, two of which matched ballistics evidence at the victim's home, were found in the defendants' car); *State v. Evans*, 495 N.W.2d 760, 761-62 (Iowa 1993) (noting that a ballistic test showed the defendant's .357 firearm was the murder weapon); *State v.*



21. Accident reconstruction investigation and analysis;<sup>42</sup>
22. Autopsy reports;<sup>43</sup>
23. Physicians' notes and reports;<sup>44</sup>
24. Psychiatric reports;<sup>45</sup>
25. Nursing notes and reports;<sup>46</sup>
26. Staffing notes and reports;<sup>47</sup>
27. Hospital admission notes, reports, and summaries;<sup>48</sup>

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Pepples, 250 N.W.2d 390, 394-95 (Iowa 1977) (holding that the admission of testimony regarding the trigger pull of defendant's weapon was not an abuse of discretion); State v. Mark, 286 N.W.2d 396, 413-14 (Iowa 1979) (holding that neutron activation analysis of bullets was properly admitted in a homicide trial).

42. See State v. Wissing, 528 N.W.2d 561, 563 (Iowa 1995) (stating that an accident reconstruction used to estimate speed at the time of impact in a vehicular homicide prosecution indicated the defendant was traveling faster than thirty miles over the posted speed limit); Nichols v. Schweitzer, 472 N.W.2d 266, 275-76 (Iowa 1991) (holding that the trial court did not err in disallowing an officer's testimony with regard to whether the vehicle was moving because the officer's testimony was based on statements he took from other witnesses, not on any special training, experience, or knowledge); State v. Van Scoyoc, 511 N.W.2d 628, 631 (Iowa Ct. App. 1993) (holding that the defendant was entitled to an accident reconstruction expert in a vehicular homicide case).

43. See IOWA CODE § 331.802(6) (2003) (stating an autopsy report is admissible in court); State v. Weaver, 554 N.W.2d 240, 243-44 (Iowa 1996) (discussing the findings of the victim's autopsy report).

44. See IOWA CODE § 622.28 ("Any writing or record . . . offered as memoranda or records of acts, conditions or events to prove the facts stated therein, shall be admissible as evidence if . . . they were made in the regular course of a business . . ."); State v. Fisher, 178 N.W.2d 380, 381-85 (Iowa 1970) (holding a laboratory report was inadmissible because it was not properly authenticated, but implying the record would have been admissible if the report was properly identified).

45. See IOWA CODE § 622.28 (permitting the introduction of business records into evidence); State v. Booth, 169 N.W.2d 869, 874 (Iowa 1969) (noting "the trial court had permitted portions of [the psychiatric report] to be introduced" in a rape case, but correctly refused to let the jury use the report in deliberations because defendant's sanity was not in issue); State *ex rel* Bruner v. Sanders, 129 N.W.2d 602, 604 (Iowa 1964) (noting the psychiatric report was part of the record at the trial court).

46. See IOWA CODE § 622.28 (permitting business records to be introduced into evidence).

47. See *supra* note 44.

28. Hospital discharge notes, reports, and summaries;<sup>49</sup>
29. X-rays and their analysis;<sup>50</sup> and
30. Copies of diagrams, charts, or graphs.<sup>51</sup>

### III. INFORMATION IN THE POSSESSION OF THE STATE—THE IOWA CRIMINAL DISCOVERY SYSTEM

The policy behind Iowa's current system of expanded discovery in criminal cases was set forth in *State v. Eads*.<sup>52</sup> In *Eads*, the defendant filed a motion requesting the State to produce the following evidence while the prosecution of his murder conviction was pending: (1) written statements secured by the police, (2) copies of FBI reports analyzing certain physical evidence, (3) photographs of the deceased, (4) physical evidence in the possession of the state, (5) autopsy reports, and (6) all exculpatory evidence.<sup>53</sup> The trial judge granted the motion with the exception of the paragraph requesting "exculpatory evidence," and the state appealed the ruling.<sup>54</sup> The Iowa Supreme Court found the trial court had the inherent authority "to compel disclosure of evidence by the State when necessary in the interests of justice."<sup>55</sup> The court noted the arguments against pretrial disclosure by the state as follows: (1) it would increase the likelihood of fabricated or perjured testimony, (2) witnesses may be intimidated or bribed, (3) it would give the defense an unfair advantage, and (4) defense attorneys may receive the information from other sources.<sup>56</sup>

In answering the State's objections, the court stated that one of the goals of expanding discovery rights in criminal cases was the elimination of

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48. *Id.*

49. *Id.*

50. *See State v. Matheson*, 103 N.W. 137, 139 (Iowa 1905) (holding an X-ray was properly admitted into evidence on the same basis as a photograph).

51. *See State v. Sanders*, 312 N.W.2d 534, 540 (Iowa 1981) (upholding a witness's use of visual aids during his testimony); *State v. Maniccia*, 355 N.W.2d 256, 262-63 (Iowa Ct. App. 1984) (discussing numerous diagrams that were introduced into evidence at the trial court).

52. *State v. Eads*, 166 N.W.2d 766 (Iowa 1969).

53. *Id.* at 767.

54. *Id.* at 768.

55. *Id.* at 769.

56. *Id.*

“surprise and guile” from criminal trials.<sup>57</sup> The ultimate concern of the *Eads* court was to ensure the defendant a fair trial.<sup>58</sup> The court recognized that a defendant is insulated from unfair prosecution by various safeguards.<sup>59</sup> However, the court expressed concern with the circumstances under which these safeguards are provided:

We must recognize, however, the circumstances under which a defendant is afforded these safeguards. He is frequently in custody; more often than not he is without funds; and seldom has he any opportunity to make an investigation or to engage in the fact-finding process so vital to his later defense. Meanwhile the State, with unlimited manpower and resources, has already completed its investigation, sometimes even before a formal charge is filed. If perchance the defendant should be able to conduct his own investigation, the trail is often cold when he starts after his evidence and ordinary sources of information have dried up. The argument has been made he already knows most of these things, and this is true if he is guilty. *But at this point he is presumed to be innocent.*

If this presumption is anything other than a meaningless maxim, we are obligated to afford a person charged with commission of a crime a fair chance to defend himself. We must admit, for instance, a lawyer is of little help if he has none of the trial tools with which to work. He cannot adequately defend if he is denied access to the facts. The State cannot discharge its duty to give defendant a fair trial simply by extending “safeguards” with one hand and withdrawing them with the other.

....

The defendant, of course, has the right to cross-examine the witnesses who testify regarding the manner in which such evidence incriminates him. How can he adequately do so without pre-trial preparation? How does he meet that testimony, usually from an expert witness, by a spur-of-the-moment cross-examination?<sup>60</sup>

Thus, the rationale of the *Eads* court in permitting pretrial discovery in a criminal case was to assure the defendant a fair trial.<sup>61</sup> As a result, the

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57. *Id.*

58. *Id.* at 771.

59. *Id.*

60. *Id.* (citing *Layman v. State*, 355 P.2d 444, 448 (Okla. Crim. App. 1960)) (emphasis added).

61. *Id.*

court upheld the order to disclose the evidence, except for the requested police reports and statements made by the witness the state intended to call at trial.<sup>62</sup>

The current Iowa system allows for pretrial motions and inspection of evidence,<sup>63</sup> as well as depositions of the state's witnesses.<sup>64</sup> Armed with these tools, an attorney can develop an investigative and formal discovery strategy to minimize surprise and effectively meet and rebut any potential evidence offered by the state. The importance of the policy pronounced in *Eads* will become apparent later in this Part.

Although the Iowa Rules of Criminal Procedure allow for expanded discovery, the practitioner should be aware of other rules and their implications before conducting formal discovery. One such rule, used for confining the state's evidence, is the rule regarding the minutes of testimony.<sup>65</sup>

#### A. *Minutes of Testimony*

Attached to the trial information or indictment, the state must file minutes of testimony, which is a "notice in writing stating the name, place of residence and occupation of each witness" and a "full and fair statement of the witness's expected testimony."<sup>66</sup> It should be noted that the minutes of testimony usually contains only a summary of the witness's testimony, not sworn testimony.<sup>67</sup> The minutes of testimony are created by the county attorney, who gathers the relevant information and drafts the minutes of testimony for each witness. In some cases, the county attorney attaches the police reports to the statement in lieu of, or in addition to, the minutes. The purpose of the Iowa rule requiring minutes of testimony to be filed "is to eliminate claims of foul play and provide an accused meaningful

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62. *Id.* at 772-73.

63. IOWA R. CRIM. P. 2.14(2)(a)(1) (allowing for inspection of evidence upon the defendant's pretrial motion).

64. *Id.* R. 2.13(1) ("A defendant in a criminal case may depose all witnesses listed by the state on the indictment or information or notice of additional witnesses in the same manner and with like effect and with the same limitation as in civil actions except as otherwise provided by statute and these rules.").

65. *Id.* R. 2.4(6).

66. *Id.* R. 2.5(3).

67. *State v. Bishop*, 387 N.W.2d 554, 559 (Iowa 1986) (holding that the trial court did not err in preventing defense counsel from impeaching a witness with minutes of testimony because it is not sworn testimony).

information from which a defense may be prepared.”<sup>68</sup>

A careful review of the minutes of testimony is critical to the defense’s preparation. The minutes of testimony define the limits of the state’s case.<sup>69</sup> The term “full and fair” imposes an obligation on the prosecution to adequately alert defense counsel to the nature and source of the testimony, as well as to give notice of the need for further investigation into the details of a witness’s testimony.<sup>70</sup> In some cases, if the trial information is deficient, counsel may wish to forgo any formal discovery. This tactic, however, is fraught with hazards, the most notable being that the state may amend the minutes of testimony and thus not be bound by the original minutes of testimony.<sup>71</sup> The trial court has a great deal of discretion in imposing sanctions on the state for untimely disclosure of additional testimony or additional witnesses.<sup>72</sup> The court is not required to exclude testimony that exceeds the scope of the minutes or bar testimony offered by an unlisted witness unless a less severe remedy would be inadequate to shield the defendant from undue prejudice.<sup>73</sup>

The term “‘full and fair’ does not require the State to use ‘precision’ in composing the expected testimony of each witness.”<sup>74</sup> In *State v. Ellis*,<sup>75</sup> the minutes of testimony stated that the witness would testify

that . . . she saw the defendant walk away from the Smith (victim’s)

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68. *State v. Wells*, 522 N.W.2d 304, 307 (Iowa Ct. App. 1994); *see State v. Walker*, 281 N.W.2d 612, 614 (Iowa 1979) (stating that the minutes of testimony “need not detail each circumstance of the testimony, but they must be sufficient—fully and fairly—to alert defendant generally to the source and nature of the evidence against him”).

69. *See, e.g., State v. Olsen*, 293 N.W.2d 216, 220-21 (Iowa 1980) (awarding the defendant a new trial because the state’s witness testified beyond the scope of “‘matters set out in the minutes of testimony’”); *State v. Walker*, 281 N.W.2d at 614 (holding that minutes of testimony must be sufficient to fully and fairly alert the defendant of the source and nature of the state’s evidence).

70. *State v. Lord*, 341 N.W.2d 741, 743 (Iowa 1983) (citing *State v. Walker*, 281 N.W.2d at 614).

71. *See State v. Wells*, 522 N.W.2d at 307 (“The court may permit the State to amend the minutes before or during the trial unless ‘substantial rights of the defendant’ would be prejudiced, or a ‘wholly new and different offense’ is charged.”) (quoting IOWA R. CRIM. P. 4(8)(a), (e); *State v. Braun*, 495 N.W.2d 735, 741 (Iowa 1993)).

72. *See IOWA R. CRIM. P. 2.19(b)(3)* (describing sanctions for failure to disclose).

73. *Id.*

74. *State v. Wells*, 522 N.W.2d at 307 (citing *State v. Ellis*, 350 N.W.2d 178, 181 (1984)).

75. *State v. Ellis*, 350 N.W.2d 178 (Iowa 1984).

home . . . ; that she saw what appeared to be a paper sack under the defendant's shirt; that the defendant came to her residence from across the street and asked her to get him out of the neighborhood; that she drove him to 1111 S.E. 30th where he met with a man called Chip; that the defendant told her that he had gotten "some really valuable stuff this time" and . . . that the defendant gave Chip some merchandise to sell for him . . . .<sup>76</sup>

*Ellis* illustrates two issues confronting defense counsel: (1) the addition of testimony not contained in the minutes, and (2) the addition of a new witness.<sup>77</sup> The court resolved both issues in favor of admission of testimony.<sup>78</sup>

### B. Additional Testimony

At the defendant's trial for burglary in *Ellis*, a witness for the state testified, over the defendant's objection, that the defendant's right hand had been bleeding when he returned from the victim's house.<sup>79</sup> That information was clearly not contained in the minutes of testimony.<sup>80</sup> The Iowa Supreme Court held that "[a]lthough the minutes did not specifically detail the evidence . . . , the challenged testimony was consistent with the overall nature of the minutes of . . . testimony."<sup>81</sup> The court premised its holding on the general descriptive terminology of the minutes and found the "condition of his general appearance and hands could be expected from the minutes to be a part of" the witness's testimony.<sup>82</sup>

### C. Adding a New Witness

A more remarkable turn of events occurred in *Ellis* after the defense counsel had established the latent fingerprints found at the crime scene had not been compared to the defendant's fingerprints.<sup>83</sup> The state wished to call an officer not listed on the trial information to testify about the

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76. *Id.* at 181.

77. *See id.* at 181-82 (noting that two of the defendant's arguments on appeal were the scope of the minutes of testimony and the propriety of testimony from a witness not listed on the trial information).

78. *See id.* (finding no error on either issue).

79. *Id.* at 182.

80. *See supra* note 76 and accompanying text.

81. *State v. Ellis*, 350 N.W.2d at 182 (citing *State v. Ristau*, 340 N.W.2d 273, 274-75 (Iowa 1983)).

82. *Id.*

83. *Id.*

fingerprints.<sup>84</sup> The defense counsel objected because the state had not complied with Iowa Rule of Criminal Procedure 18(3), providing that the state should give notice of all prosecution witnesses ten days prior to trial.<sup>85</sup> The trial court admitted the officer's testimony but allowed defense counsel to depose the officer before he took the stand.<sup>86</sup> Defense counsel was fortunate; the testimony offered was exculpatory—the latent fingerprints could not be identified as those of the defendant.<sup>87</sup> The Iowa Supreme Court held the trial court did not abuse its discretion by permitting the witness to testify.<sup>88</sup> The court noted that exclusion of the testimony was not required, and the defendant had been given a delay so that he could depose the witness.<sup>89</sup>

The *Ellis* decision highlights the importance of pretrial investigation and discovery. The conclusion reached by the appellate court gives trial courts extensive latitude in admitting evidence not specifically referred to in the minutes of testimony, as well as the testimony of new witnesses.<sup>90</sup> Cross-examining a witness on very short notice can be unnerving at best and can wreak havoc on defense counsel's trial strategy. Even more problematic, as noted in *Eads*, is cross-examination of an expert witness, which may require pretrial preparation even more so than cross-examination of a lay witness.<sup>91</sup>

#### IV. EXPERT TESTIMONY

The standard for the admissibility of expert testimony is set forth in Iowa Rule of Evidence 5.702.<sup>92</sup> After discovering the identity of the state's

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84. *Id.*

85. *Id.* (noting that Rule 18(3) permits the court to order discovery of witnesses, to grant a continuance, or to enter any other order, including exclusion, in order to avoid undue prejudice) (citing IOWA R. CRIM. P. 18(3)). Rule 18(3) is currently enumerated as Rule 2.19(3).

86. *Id.*

87. *Id.* at 183.

88. *Id.*

89. *Id.*

90. *See id.* at 182 (finding no error in allowing the new witness to testify when defense counsel deposed him before he testified).

91. *See State v. Eads*, 166 N.W.2d 766, 771 (Iowa 1969) ("How does [the defendant] meet [incriminating] testimony, usually from an expert witness, by a spur-of-the-moment cross-examination?") (citing *Layman v. State*, 355 P.2d 444, 448 (Okla. Crim. App. 1960)).

92. *See IOWA R. EVID. 5.702* ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact

experts and the bases for their opinions, reviewing the information presented may provide for an objection to the admission of the evidence in its entirety, or the possibility to narrow the expert's testimony. In *Daubert v. Merrell Dow Pharmaceuticals*,<sup>93</sup> the United States Supreme Court addressed the issue of admissibility of expert testimony. The Court found that such evidence must be both scientifically reliable and relevant.<sup>94</sup>

Under *Daubert*, the trial court must determine if the opinion of the expert is reliable.<sup>95</sup> In making that determination, the court may consider: (1) whether the theory or technique has been or can be tested, (2) whether the theory or technique has been proven by the peer review process or published within the scientific community, (3) the known rate of error, or the potential rate of error, or (4) whether standards exist in the particular field or science from which the expertise comes, and (5) whether the theory or technique that is the subject of the opinion or testimony has been generally accepted by the particular scientific community.<sup>96</sup>

The question of relevance is the same as that presented in regard to any evidence offered—it requires a link between the evidence and a fact in issue.<sup>97</sup> In *Daubert*, the Court held that there must be some kind of logical connection between the evidence offered and the issue in controversy.<sup>98</sup> The Court concluded that the “Federal Rules of Evidence . . . do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent

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in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.”).

93. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

94. *Id.* at 592-95.

95. *Id.* at 592-93.

96. *Id.* at 591-95.

97. See IOWA R. EVID. 5.401 (“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”).

98. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. at 591 (“The consideration has been aptly described by Judge Becker as one of ‘fit.’ ‘Fit’ is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes. The study of the phases of the moon, for example, may provide valid scientific ‘knowledge’ about whether a certain night was dark, and if darkness is a fact in issue, the knowledge will assist the trier of fact. However (absent creditable grounds supporting such a link), evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night.”) (citations omitted).



evidence based on scientifically valid principles will satisfy those demands.”<sup>99</sup>

The Iowa rule regarding expert witness testimony is currently the same as the federal rule.<sup>100</sup> In *Hutchison v. American Family Mutual Insurance Co.*,<sup>101</sup> the Iowa Supreme Court adopted both the rationale stated in *Daubert* and Federal Rule of Evidence 702.<sup>102</sup> In *Hutchison*, a trial court’s decision to allow a clinical psychologist to testify about matters for which he was not board certified was contested.<sup>103</sup> The court held the lack of certification went to the weight and credibility of the testimony, not its admissibility.<sup>104</sup> The court also addressed the plaintiff’s arguments regarding the expert’s reliance on hearsay evidence.<sup>105</sup> The Iowa Supreme Court rejected the plaintiff’s argument because an expert is allowed to use any facts or data if they are reasonably relied upon by experts in the particular field.<sup>106</sup> Because the expert relied on the types of documents others in the field did, the testimony was admissible.<sup>107</sup> Of particular interest was the court’s approval of the trial court’s decision disallowing a

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99. *Id.* at 597.

100. *Compare* IOWA R. EVID. 5.702, *with* FED. R. EVID. 702.

101. *Hutchison v. Am. Family Mut. Ins. Co.*, 514 N.W.2d 882 (Iowa 1994).

102. *Id.* at 885-86. The court observed:

Rule 702 thus codified Iowa’s existing “liberal rule on the admission of opinion testimony.” The United States Supreme Court recently reaffirmed this approach in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* In *Daubert*, the Court rejected the *Frye* test of admissibility, which required the expert opinion to be based on a scientific technique that is “generally accepted” as reliable in the relevant scientific community. The Court stated that “the Rules of Evidence—especially Rule 702—do assign to the trial judge the task of ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.”

*Id.* (citations omitted).

103. *Id.* at 886-89.

104. *Id.* at 886.

105. *Id.* at 889.

106. *Id.* (citing IOWA R. EVID. 5.703). Rule 5.703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the trial or hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

IOWA R. EVID. 5.703.

107. *Hutchison v. Am. Family Mut. Ins. Co.*, 514 N.W.2d at 889.

computer-generated film depicting the effects of a closed-head injury on the brain.<sup>108</sup> The court found the film was not properly authenticated because the physician who purported to authenticate the film lacked knowledge about the specific accident at issue, “particularly the speed, weight, and distances of the vehicles involved to authenticate it as a genuine representation of [the] injury.”<sup>109</sup> The court found the tape was properly excluded because it “afforded manifold opportunities for fabrication and distortion,” because the tape did not re-create the particular accident at issue in the case.<sup>110</sup>

The Iowa Supreme Court noted a concern that expert testimony may fall within “the realm of conjecture, speculation, and surmise.”<sup>111</sup> In *Daubert*, the United States Supreme Court also noted Merrell Dow’s fear that the standard enunciated for admissibility may “result in a ‘free-for-all’ in which befuddled juries are confounded by absurd and irrational pseudoscientific assertions.”<sup>112</sup> Both courts regarded these concerns as minimal, relying on the adversarial process to point out deficiencies in expert testimony by “[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof.”<sup>113</sup>

#### A. Experts and Syndrome Evidence<sup>114</sup>

In 1986, an article was published in the *Journal of Criminal Law and Criminology* entitled *Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel Psychological Evidence*.<sup>115</sup> In this article, Professor McCord

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108. *Id.* at 890.

109. *Id.* (“A proper foundation for admission into evidence of a motion picture demands only that the fidelity of the film’s portrayal be established.”).

110. *See id.* (quoting 2 EDWARD W. MCLEARY, MCCORMICK ON EVIDENCE § 214, at 17 (4th ed. 1992)).

111. *Id.* at 888 (quoting *Slack v. C.L. Percival Co.*, 199 N.W. 323, 326 (Iowa 1924)).

112. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 595 (1993).

113. *Id.* at 596 (citing *Rock v. Arkansas*, 483 U.S. 44, 61 (1987)); *see Hutchison v. Am. Fam. Ins. Co.*, 514 N.W.2d at 888 (“[W]e believe with the aid of vigorous cross examination, the jury is fully capable of detecting the most plausible explanation of events.”).

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115. David McCord, *Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel Psychological Evidence*, 77 J. CRIM. L. & CRIMINOLOGY 1 (1986).

pointed to four ways in which prosecutors have used expert testimony: (1) to offer diagnosis to prove sexual abuse occurred, (2) “to vouch for the complainant’s credibility,” (3) to enhance the credibility by explaining “unusual” behavior highlighted by the defendant, and (4) to enhance the credibility of the complainant “by explaining the capabilities of children.”<sup>116</sup> Although published prior to *Daubert* and *Hutchinson*, Professor McCord’s article reads like blueprint for the admission of “syndrome” testimony in Iowa.<sup>117</sup>

*State v. Seevanhsa*<sup>118</sup> presents a case in which a child protective worker was called to testify about Child Sexual Abuse Accommodation Syndrome.<sup>119</sup> After the defense attorney cross examined the complainant, the worker was called to testify about the characteristics of the syndrome.<sup>120</sup> The court noted “[s]he did not testify she believed the complainant,” the complainant was credible, or that a sexual assault had occurred.<sup>121</sup> “She limited her discussion to an explanation of the symptoms common to children who have been sexually abused.”<sup>122</sup> The defendant pointed out the factors included in the expert testimony happened to coincide with many of the specifics of the complainant’s testimony.<sup>123</sup> Because the expert did not express a direct opinion as to the credibility of the complainant, the court found any indirect effect on credibility was “not problematic.”<sup>124</sup> The court’s logic seems to consume its own premise of admissibility. If the evidence is relevant, it must show that some fact in issue is more or less likely—there must be a “fit” between the evidence and the issues presented to the jury.<sup>125</sup> If, on the other hand, it is general information not specific to the case, it lacks foundation and is not relevant.<sup>126</sup> The “fit” or logical connection to the case is broken by the general nature of the testimony. It invites the jury to speculate as to whether the complainant’s symptoms fit the general characteristics described by the expert. Jurors are thereby invited to become witnesses.

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116. *Id.* at 5.

117. *Id.* at 10-17.

118. *State v. Seevanhsa*, 495 N.W.2d 354 (Iowa Ct. App. 1992).

119. *Id.* at 355.

120. *Id.*

121. *Id.* at 357.

122. *Id.*

123. *Id.* at 355.

124. *Id.* at 357.

125. IOWA R. EVID. 5.401.

126. *See Hutchinson v. Am. Family Mut. Ins. Co.*, 514 N.W.2d 882, 890 (Iowa 1994) (excluding a film as evidence because of lack of foundation).

*Seevanhsa's* origins occurred at the same time Professor McCord's article was published.<sup>127</sup> In *State v. Myers*,<sup>128</sup> the Iowa Supreme Court addressed the issue of an expert's opinion as to the veracity of a complainant's testimony.<sup>129</sup> Myers was tried for indecent contact with a minor.<sup>130</sup> The state called the complainant, an eight-year-old girl, her sister, and two other corroborating witnesses to testify about the incident.<sup>131</sup> Two witnesses were called to testify as "experts."<sup>132</sup> The first was the principal of the elementary school attended by the complainant.<sup>133</sup> The principal was allowed to testify that, statistically, children do not lie about sexual abuse complaints and that, in her experience as a principal in an elementary school for three years, "there has not been a child who has lied about something like this. So I do believe the children."<sup>134</sup> The second "expert" witness was a child abuse investigator who worked for the Department of Human Services.<sup>135</sup> The investigator was called by the defense to testify about prior inconsistent statements made to her by the complainant.<sup>136</sup> During cross-examination, the investigator opined: "In all the years I've worked, which is sixteen, I have only had one child that lied to me about sexual abuse, and it is my opinion that it is very rare for a child to lie about this subject."<sup>137</sup>

The Iowa Supreme Court focused on the substance of the testimony rather than the qualifications of the experts.<sup>138</sup> The court examined a number of cases that allowed expert testimony on the after-effects of a sexual assault, such as emotional and psychological trauma.<sup>139</sup> After a discussion of case law, the court concluded:

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127. Alleged incidents of incestuous behavior occurred between 1987 and 1990, shortly after Professor McCord's article was published in 1986. See *State v. Seevanhsa*, 495 N.W.2d at 355; McCord, *supra* note 115, at 1.

128. *State v. Myers*, 382 N.W.2d 91 (Iowa 1986).

129. *Id.* at 91.

130. *Id.*

131. *Id.* at 92.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 93 ("The qualifications of these two witnesses is not in issue; the subject matter of their expert opinion testimony is our focus.").

139. *Id.* at 96-97 (discussing *People v. Bledsoe*, 681 P.2d 291 (Cal. 1984); *State v. Myers*, 359 N.W.2d 604 (Minn. 1984); and *State v. Middleton*, 657 P.2d 1215 (Or. 1983)).

The ultimate determination of the credibility or truthfulness of a witness is not “a fact in issue,” but a matter to be generally determined solely by the jury. . . . Consequently, we conclude that expert opinions as to the truthfulness of a witness is not admissible pursuant to rule 702. As we indicated, the effect of the expert opinions in this case was the same as directly opining on the truthfulness of the complaining witness.<sup>140</sup>

In *State v. Gettier*,<sup>141</sup> the Iowa Supreme Court revisited the admissibility of expert testimony in sexual abuse cases.<sup>142</sup> In *Gettier*, a psychologist was allowed to testify that individuals who suffered from posttraumatic stress disorder displayed a “fear of staying alone, sleep disturbances, social and sexual impairment and hyperalertness.”<sup>143</sup> The court noted that the term “rape trauma syndrome” was not specifically referred to in the trial, that the admission of general testimony regarding symptoms was within the trial court’s discretion, and that the evidence was relevant to show the victim experienced trauma.<sup>144</sup>

In *State v. Pansegrau*,<sup>145</sup> however, the Iowa Court of Appeals reversed a conviction for sexual abuse on the erroneous admission of expert testimony.<sup>146</sup> The issue before the court was the admission of a doctor’s testimony that the complainant had delayed reporting a sexual assault because of rape trauma syndrome.<sup>147</sup> The court found the trial court abused its discretion in admitting the testimony, and relying on *Gettier*, held that the evidence was not of a general symptom, but of a personalized opinion and conclusion.<sup>148</sup>

More recently, in *State v. Griffin*,<sup>149</sup> the Iowa Supreme Court found the admission of a social worker’s testimony regarding “battered women’s syndrome” was proper.<sup>150</sup> In *Griffin*, the complainant initially stated that the defendant had sexually assaulted her, but then later recanted the

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140. *Id.* at 97.

141. *State v. Gettier*, 438 N.W.2d 1 (Iowa 1989).

142. *Id.* at 4-6.

143. *Id.* at 4.

144. *Id.* at 6.

145. *State v. Pansegrau*, 524 N.W.2d 207 (Iowa Ct. App. 1994).

146. *Id.* at 211.

147. *Id.* at 209-10.

148. *Id.* at 211.

149. *State v. Griffin*, 564 N.W.2d 370 (Iowa 1997).

150. *Id.* at 374.

allegations.<sup>151</sup> The court noted that the complainant's credibility was a central issue in the case.<sup>152</sup> In order to bolster the testimony of the complainant, the state called a social worker and asked her whether she ever "[ran] into victims who refused to testify against their batterer."<sup>153</sup> The social worker replied:

"Well, based on the battered women's syndrome, it is the battered woman's perception, reasonable perception that another beating is inevitable. And that all of our assistance, meaning the criminal justice system, counselors, our assistance will not be effective in stopping the violence. It hasn't been in the past for her, and so it is her reasonable belief that to testify against the batterer and not—versus showing him loyalty, being a wonderful actress in making sure that he believes she won't testify, that she will lie for him, she will do whatever it takes, is a life-saving coping skill for her.

I hear law enforcement officers tell me all the time, battered women, they lie and they're great actresses. And my response is always, 'they better be great actresses. Their life may depend on it.'"<sup>154</sup>

The inflammatory nature of the social worker's testimony is obvious, because it asserts: (1) the complainant is more credible if she recants or gives inconsistent testimony, (2) the criminal justice system has failed the complainant in the past, and (3) the defendant will repeat the conduct and kill the complainant. Arguably, the testimony does not assist the jurors much; it is designed as a charge to the jurors to act to save the complainant's life before the defendant strikes again.

Iowa courts have held that expert testimony regarding general symptoms is proper,<sup>155</sup> while testimony that is specific is not allowed.<sup>156</sup> The distinction drawn by the court is superfluous to defense counsel confronted by an expert who graphically describes the "general symptoms" of a syndrome, inferentially telling the jury what and whom to believe.

The expert test of whether someone has been the victim of sexual abuse becomes:

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151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 374-75.

155. *See State v. Gettier*, 438 N.W.2d 1, 6 (Iowa 1989) (holding that expert testimony regarding the typical symptoms exhibited by a traumatized person was proper).

156. *See State v. Myers*, 382 N.W.2d 91, 93 (Iowa 1986) (finding expert testimony that children almost never lie about sexual abuse is improper).

1. Does the individual have a fear of being alone?
2. Does the individual have difficulty sleeping?
3. Does the individual have difficulty with social interaction?
4. Does the individual suffer from some sexual dysfunction?
5. Is the individual hyperalert?

The expert test of whether a witness is credible becomes: whether the person has recanted or given prior inconsistent statements. If so, the individual is suffering from battered women's syndrome, and the criminal justice system has failed to protect her from the assailant.

The expert witness becomes the thirteenth "super" juror, advising the jurors how to discern who is telling the truth and what verdict should be returned. The expert provides the list of criteria. A juror need only apply the criteria to the evidence. If the answer to a number of the questions is "yes," the complainant is considered a victim of sexual abuse or a battered woman. It would be interesting to apply the above criteria to students in a professional school—law or medicine. Would affirmative answers indicate that those students are victims of sexual abuse or battered women, or are they merely reacting to the pressure of the school? Is the expert testimony based on science or pseudoscience? Have the courts given prosecutors a method to assist jurors in assessing testimony or a means to resolve questionable testimony in favor of the state?

The limitation that the expert cannot say he or she believes a complainant is a distinction without difference. To the jury, it is a nod by the expert to believe the complainant. Therefore, it is imperative that defense counsel conduct a full investigation of the expert, his or her credentials, and the basis of his or her opinion in order to protect the client. It is certain that *Daubert* and its progeny will drive expert opinion to its full fruition for some, and to "absurd and irrational pseudoscientific assertions"<sup>157</sup> for others, depending on the side against which the testimony is offered.

The previous discussion of expert testimony is not an exclusive or extensive list. The term "expert" may be applied to almost any witness, assuming certain foundation requirements are met.<sup>158</sup> The list of areas of

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157. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 595 (1993).

158. *See State v. Belken*, 633 N.W.2d 786, 800 (Iowa 2001) ("Any special 'knowledge, skill, experience, training, or education' can qualify a witness as an expert.") (quoting IOWA R. EVID. 702).

expertise is always expanding.<sup>159</sup> Regardless of opinions regarding the scope of expert testimony, its power cannot be underestimated. It must be met by defense counsel.

### B. *The Need for a Defense Expert*

During the course of factual investigation of expert testimony, it will become obvious that an attorney's limited familiarity with material will only provide a superficial understanding of the subject matter. Contacting an expert will be necessary before investigation and discovery of the state's experts are completed. If the defenses of insanity, diminished responsibility, or intoxication are to be adequately raised and presented, the retention of an expert is vital. The Iowa Rules of Criminal Procedure provide for the retention of expert witnesses at state expense,<sup>160</sup> as does the Iowa Code.<sup>161</sup> The ability to retain an expert at state expense, however, is not absolute; a preliminary showing must be made to invoke the rule.<sup>162</sup> The United States Supreme Court has also addressed the need of defense counsel to have access to expert witnesses.<sup>163</sup>

#### 1. *Expert Witnesses—A Matter of Due Process*

In *Ake v. Oklahoma*,<sup>164</sup> the United States Supreme Court addressed a due process challenge to a state court's failure to appoint a defense

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159. See, e.g., *Geringer v. Iowa Dep't of Human Servs.*, 521 N.W.2d 730, 730-31 (Iowa 1994) (affirming admission of child abuse report regarding Munchhausen Syndrome by Proxy, "a form of child abuse in which a parent repeatedly presents their child for unnecessary medical treatments by simulating or producing symptoms in the child").

160. IOWA R. CRIM. P. 2.20(4). Rule 2.20(4) provides:

Counsel for a defendant who because of indigency is financially unable to obtain expert or other witnesses necessary to an adequate defense of the case may request in a written application that the necessary witnesses be secured at public expense. Upon finding, after appropriate inquiry, that the services are necessary and that the defendant is financially unable to provide compensation, the court shall authorize counsel to obtain the witnesses on behalf of the defendant. The court shall determine reasonable compensation and direct payment pursuant to Iowa Code chapter 815.

*Id.*

161. IOWA CODE §§ 815.4 -.5 (2003).

162. IOWA R. CRIM. P. 2.20(4).

163. See discussion *infra* Part IV.B.1.

164. *Ake v. Oklahoma*, 470 U.S. 68 (1985).



expert.<sup>165</sup> Mr. Ake was charged with two counts of murder in the first degree and two counts of shooting with intent to kill.<sup>166</sup> During Mr. Ake's arraignment, his behavior was so unusual that the judge ordered a psychiatric examination sua sponte.<sup>167</sup> The psychiatrist's initial finding was that Ake was suffering from delusions and was likely a paranoid schizophrenic.<sup>168</sup> The court ordered an additional psychiatric examination, which resulted in testimony at a competency hearing portraying Ake as a psychotic, paranoid schizophrenic suffering from delusions, who should be hospitalized.<sup>169</sup> The court ordered Ake committed.<sup>170</sup> Six weeks later, after receiving antipsychotic drugs, the chief forensic psychiatrist of the state hospital advised the court that Ake was competent to stand trial,<sup>171</sup> and the state then proceeded with the charges against Ake.<sup>172</sup>

Ake had never been examined regarding his mental status at the time of the commission of the offense.<sup>173</sup> Defense counsel requested that the court have him examined or provide funds so defense counsel could have him examined.<sup>174</sup> The court denied the request.<sup>175</sup> Ake proceeded to trial, raising the defense of insanity.<sup>176</sup> Although defense counsel called the experts who examined Ake, they could not testify about his mental capacity at the time of the offense because they had not examined him for that purpose.<sup>177</sup> The state made a point of inquiring as to whether any expert had seen any results of an examination of Ake diagnosing his mental status at the time of the offense.<sup>178</sup> Of course, all responded that they had not.<sup>179</sup> The trial court instructed the jury that the defendant was presumed sane at the time of the offense and that the defendant had the burden of presenting evidence sufficient to raise a reasonable doubt as to

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165. *Id.* at 70.  
166. *Id.* at 72.  
167. *Id.* at 71.  
168. *Id.*  
169. *Id.*  
170. *Id.*  
171. *Id.*  
172. *Id.* at 72.  
173. *Id.*  
174. *Id.*  
175. *Id.*  
176. *Id.*  
177. *Id.*  
178. *Id.*  
179. *Id.*

his sanity.<sup>180</sup> Ake was convicted and sentenced to be executed.<sup>181</sup>

In addressing the trial court's refusal to appoint an expert, the United States Supreme Court found a due process violation:

When the defendant is able to make an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of psychiatrist is readily apparent. It is in such cases that a defense may be devastated by the absence of a psychiatric examination and testimony; with such assistance, the defendant might have a reasonable chance of success. . . .

We therefore hold that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.<sup>182</sup>

## 2. *Experts—The Iowa Statutes and Iowa Rules of Criminal Procedure*

Iowa has had a long-standing commitment to allowing defendants to apply for and receive expert assistance. In 1965, the Iowa legislature passed Iowa Code section 775.5, which stated:

“An attorney appointed by the court to defend any person charged with a crime in this state shall be entitled to a reasonable compensation to be decided in each case by the court, including such sum or sums as the court may determine are necessary *for investigation in the interests of justice.*”<sup>183</sup>

The Iowa Supreme Court interpreted section 775.5 in *State v. Hancock*.<sup>184</sup> Hancock was charged with the crime of forgery.<sup>185</sup> The state had listed and called an expert witness to testify that the defendant had authorized the check in question.<sup>186</sup> Prior to trial, the defendant had

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180. *Id.* at 72-73.

181. *Id.* at 73.

182. *Id.* at 82-83 (footnote omitted).

183. *See State v. Hancock*, 164 N.W.2d 330, 332 (Iowa 1969) (quoting IOWA CODE § 775.5 (1965) (repealed 1978)) (emphasis added).

184. *Id.* at 332-33.

185. *Id.* at 331.

186. *Id.* at 331-32.

applied for funds to retain an expert to examine the check.<sup>187</sup> The trial court overruled the request on the basis that the state's case was not entirely dependent on the expert's testimony and that the defendant did not challenge the reliability of the expert's opinion.<sup>188</sup> The Iowa Supreme Court reversed the conviction, finding:

Initially we note it should be extremely difficult, if not impossible in most cases, for a party unschooled in the subject of handwriting expertise to effectively challenge the reliability of an expert without the aid of his own expert.

. . . .

An independent analysis of defendant's handwriting conducted by an expert of her own choosing could well have resulted in a conclusion diametrically opposed to that reached by [the state's expert]. In denying her request the court effectively prevented defendant from even the possibility of obtaining evidence which may have been highly relevant and material to a meaningful defense. Such an opportunity could not have been denied a defendant of means. Defendant's indigency should not be permitted to stand as a barrier to such vital evidence

. . . The trial court committed reversible error in denying defendant's application.<sup>189</sup>

In *State v. Williams*,<sup>190</sup> the Iowa Supreme Court defined the specificity needed for a request for expert services.<sup>191</sup> Williams's lawyer filed an application requesting that the court provide funds to retain an investigator to find and interview defense witnesses.<sup>192</sup> The trial court overruled counsel's request, finding it "vague and indefinite as to the area to be investigated, the individuals to be employed for such investigation, their number, the cost or rate of pay of said investigators, and the amount of expense which is anticipated will be incurred . . . ."<sup>193</sup> The supreme court agreed with the trial court—the application was lacking in its specificity:

We do not read the court's ruling as requiring defendant to

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187. *Id.* at 332.

188. *Id.* at 332-33.

189. *Id.* at 333.

190. *State v. Williams*, 207 N.W.2d 98 (Iowa 1973).

191. *Id.* at 105-06.

192. *Id.* at 103.

193. *Id.*

inform the court and prosecutor of the names and addresses of the persons he wanted to investigate. It did suggest that the application was inadequate in not advising the court as to the number of investigators to be employed, the area to be investigated and probable cost or rate of pay. A fair reading of the order suggests a second, more detailed statement would have been met with favorable results. Counsel did not see fit to follow the suggestion.

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When counsel requests court authority for the employment of an investigator or experts, he should point out with specificity the reasons such services are necessary.<sup>194</sup>

In *State v. McGhee*,<sup>195</sup> the Iowa Supreme Court further refined the test for determining whether a defense request is reasonable.<sup>196</sup> Defense counsel filed an application to retain an expert to explore the feasibility of an insanity defense.<sup>197</sup> The defendant had previously been examined for competency, and the findings indicated the defendant had a severe antisocial personality.<sup>198</sup> The trial court denied the request,<sup>199</sup> and the Iowa Supreme Court affirmed the decision:

[D]efense counsel in seeking benefit of psychiatric advice, at public expense . . . must make timely request for same, therein setting forth the specific reasons upon which counsel concludes (1) those services are reasonably needed or necessary, and (2) such services would otherwise be justifiably obtained were defendant financially able. The trial court (1) shall accord considerable weight to the application so made but is not thereby bound, and (2) in determining whether an insanity defense is reasonably warranted or psychiatric services are otherwise needed in defending the accused, shall effect an objective evaluation of such application, taking into consideration all relevant factors, including but not limited to (a) defendant's prior medical history as to any mental or emotional instability, (b) his past conduct, and (c) defendant's apparent mental state and demeanor as observed by the trial judge. . . . If trial court, focusing upon needs of defense counsel, finds the application is reasonable then it should be granted, but if found to be frivolous, unreasonable or without underlying factual support then a denial is in order. In either event the trial judge

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194. *Id.* at 105.

195. *State v. McGhee*, 220 N.W.2d 908 (Iowa 1974).

196. *Id.* at 913.

197. *Id.* at 909.

198. *Id.* at 913.

199. *Id.* at 909.

shall make and enter appropriate findings of fact and conclusions of law with attendant order.<sup>200</sup>

The Iowa Supreme Court upheld the denial of the defendant's request because on adequate showing that further examination by a psychiatrist was not demonstrated to be needed or necessary by the defendant.<sup>201</sup>

3. *Expert Witnesses—Due Process, Compulsory Process, and Effective Assistance of Counsel*

*English v. Missildine*<sup>202</sup> involved an indigent defendant whose mother had retained private counsel.<sup>203</sup> The attorney filed an application to retain a handwriting expert and to take depositions at public expense.<sup>204</sup> The trial court denied the application, and defense counsel petitioned the Iowa Supreme Court to review the trial court's denial.<sup>205</sup> After reviewing both Iowa Code section 815.7 and the appropriate rules of criminal procedure,<sup>206</sup> the court found the authority for the services requested in the Sixth Amendment's right to effective assistance of counsel.<sup>207</sup> The court held:

For indigents the right to effective counsel includes the right to public payment for reasonably necessary investigative services. The Constitution does not limit this right to defendants represented by appointed or assigned counsel. The determinative question is the defendant's indigency. When his indigent status is established the "defendant is constitutionally entitled to those defense services for which he demonstrates a need."

Section 815.7 and rule 19(4) partially implement this constitutional right. Although those provisions do not apply in the present situation, the Constitution independently mandates judicial recognition of an indigent's right to necessary investigative services.<sup>208</sup>

The court reaffirmed this reasoning in *State v. Coker*.<sup>209</sup> Coker, charged with robbery in the first degree, raised the defense of intoxication

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200. *Id.* at 913.

201. *Id.* at 914.

202. *English v. Missildine*, 311 N.W.2d 292 (Iowa 1981).

203. *Id.* at 293.

204. *Id.*

205. *Id.*

206. IOWA R. CRIM. P. 19(4). The current version of this Rule is enumerated as Iowa Rule of Criminal Procedure 2.20(4).

207. *English v. Missildine*, 311 N.W.2d at 293-94.

208. *Id.* (citations omitted).

209. *State v. Coker*, 412 N.W.2d 589, 591-92 (Iowa 1987).

and applied for a court-appointed expert to assist in the preparation of the defense.<sup>210</sup> In support of his application, Coker's attorney made statements at the hearing, revealing that after Mr. Coker's arrest he suffered "grand mal seizures and had to be hospitalized; and this was associated with withdrawal from the abuse of substances."<sup>211</sup> The court denied the request, finding that counsel "failed to show how the appointment of an expert witness would in this case assist [him] in his defense of intoxication."<sup>212</sup> Defense counsel moved to continue the trial and offered to waive the defendant's statutory right to speedy trial so that funds raised by the defendant's family could be used to employ an expert.<sup>213</sup> The trial court denied the motion, finding that defense counsel did not show good cause as to why the trial should be continued.<sup>214</sup> At trial, the defense offered testimony regarding intoxication, including testimony from an expert who had examined Coker after his arrest.<sup>215</sup> The expert indicated he did not have an opinion regarding Coker's intent at the time of the offense and that the formulation of such an opinion would require further examination of the defendant.<sup>216</sup> Coker was convicted, and he appealed the trial court's decision denying him access to an expert.<sup>217</sup>

The Iowa Supreme Court found the trial court had abused its discretion in not appointing an expert and remanded the case.<sup>218</sup> In reversing the conviction, the court found that Iowa Rule of Criminal Procedure 19(4)<sup>219</sup> "protects the indigent defendant's [S]ixth [A]mendment right to compulsory process as well as his or her [F]ourteenth [A]mendment due process right to prepare and present an adequate defense."<sup>220</sup>

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210. *Id.* at 590.

211. *Id.*

212. *Id.* (alteration in original).

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.* at 590-91.

217. *Id.* at 591.

218. *Id.* at 593. The court stated: "We reverse Coker's convictions and remand for new trial. On remand, trial court should appoint a competent expert, preferably but not necessarily of Coker's choosing, to examine Coker and assist him in the evaluation, preparation, and presentation of his intoxication defense." *Id.*

219. The current version of this Rule is enumerated as Iowa Rule of Criminal Procedure 2.20(4).

220. *State v. Coker*, 412 N.W.2d at 591 (footnote and citation omitted).

In *State v. Van Scoyoc*,<sup>221</sup> the defendant was charged with vehicular homicide and wished to retain an accident reconstruction expert to analyze “the physical evidence, including the road and terrain over which the vehicle traveled, and the statements of witnesses in order to establish what happened.”<sup>222</sup> The court initially authorized \$2,500 of the \$3,000 requested in the defendant’s motion.<sup>223</sup> The expert indicated that additional funds were needed, and defense counsel applied for and received an additional \$500.<sup>224</sup> As the trial approached, counsel applied for another \$2,500 to obtain the expert’s testimony at trial.<sup>225</sup> The trial court denied the request,<sup>226</sup> and Mr. Van Scoyoc was convicted of the charge.<sup>227</sup> In denying the funds, the trial court “indicated displeasure” with (1) the cost of the initial study, (2) the expert witness rate of \$120 per hour (although the state expert was charging \$110 per hour), and (3) county officials’ concern over the expenditures of public funds.<sup>228</sup>

The Iowa Court of Appeals did not address the trial court’s economic concerns, but did find:

Without the ability to offer expert testimony in opposition to the State’s expert testimony, the defendant was unable to contest the opinion regarding the speed of the van as related by the deputy sheriff who testified concerning the study made by the State’s expert. The inability to do so unquestionably prejudiced Van Scoyoc’s defense. Consequently, the denial of Van Scoyoc’s ability to offer expert testimony in his trial denied him a fair trial.<sup>229</sup>

The message to defense lawyers from the foregoing cases is threefold: (1) there is statutory, as well as constitutional support for supplying indigent defendants with expert witnesses; (2) an application for expert testimony is more likely to be granted if the request specifically outlines the need and factual support for the testimony; and (3) Iowa appellate courts will find an abuse of discretion and reverse convictions when the need for the expert is clearly supported by the record.

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221. *State v. Van Scoyoc*, 511 N.W.2d 628 (Iowa Ct. App. 1993).

222. *Id.* at 629.

223. *Id.* at 630.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* at 629.

228. *Id.* at 630-31.

229. *Id.* at 631.

With the state's increasing reliance on expert testimony, defense counsel must use fact investigation and discovery in combination with defense experts to blunt, contradict, or attack the state's case. Defense counsel's reliance on the time-tested art of cross-examination is not sufficient to cope with the state's current arsenal of experts. Counsel's duty to investigate must include an obligation to explore, understand, and present expert testimony.

*C. Full and Fair Disclosure—Expert Testimony*

As previously discussed, the Iowa Rules of Criminal Procedure require disclosure of potential witnesses and a summary of their testimony.<sup>230</sup> In the following cases, the Iowa Court of Appeals addressed this requirement.

In *State v. Bennett*,<sup>231</sup> the minutes summarizing the medical examiner's testimony stated he would testify regarding the victim's "*external appearance and then internal appearance during the course of the autopsy.*"<sup>232</sup> The minutes were held sufficient to alert defense counsel of not only the descriptive narrative of injuries, but also of the examiner's opinion and conclusion that the injuries may have been caused by sexual activity.<sup>233</sup> In a homicide case, such a change in testimony may generate a new theory of homicide—sexual abuse felony murder.<sup>234</sup>

In *State v. Nebinger*,<sup>235</sup> a police officer was listed as a witness who would testify about his investigation.<sup>236</sup> The investigation included taking a footwear impression from the victim's bathroom.<sup>237</sup> The footwear impression was sent to the department of criminal investigation for comparison.<sup>238</sup> The result of the comparison was not made available until after the trial had begun.<sup>239</sup> The trial court allowed the officer to testify about the result of the investigation.<sup>240</sup> The Iowa Court of Appeals held

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230. IOWA R. CRIM. P. 2.5(3).

231. *State v. Bennett*, 503 N.W.2d 42 (Iowa Ct. App. 1993).

232. *Id.* at 47.

233. *Id.*

234. See IOWA CODE § 707.2(2) (2003) ("A person commits murder in the first degree when the person commits murder . . . while participating in a forcible felony.").

235. *State v. Nebinger*, 412 N.W.2d 180 (Iowa Ct. App. 1987).

236. *Id.* at 189-90.

237. *Id.* at 190.

238. *Id.*

239. *Id.*

240. *Id.*



that because the officer was previously listed as a witness, Iowa Rule of Criminal Procedure 18(3) did not apply.<sup>241</sup> The court further found that the testimony did not exceed the scope of the minutes and that it was not prejudicial.<sup>242</sup> The court did note the absence of a discovery order requiring the state to produce “scientific tests,” which would have placed a greater burden on the State to produce the results prior to trial.<sup>243</sup>

The defense counsel’s opening statement made the police officer’s testimony in *Nebinger* devastating. Counsel claimed the defendant was not at the crime scene and the state had no evidence to prove otherwise.<sup>244</sup> The testimony of the officer clearly contradicted the defendant’s claim, thereby calling into question the entire defense strategy. It is unclear from the opinion whether the court was sanctioning this type of activity by the state, but if the purpose behind minutes of testimony is to alert counsel of the evidence against the accused *prior to trial*, this type of conduct must surely violate that policy consideration.

The Iowa Court of Appeals has held that “the State is not bound to the original minutes of testimony provided to the defendant.”<sup>245</sup> Thus, the “court may permit the State to amend the minutes both before or during the trial unless ‘substantial rights of the defendant’ would be prejudiced, or a ‘wholly new and different offense is charged.’”<sup>246</sup> Application of the test produces results that are at odds with the policy behind the rule “to eliminate claims of foul play and provide an accused meaningful information from which a defense may be prepared.”<sup>247</sup> Whether the state is adding witnesses and their minutes of testimony<sup>248</sup> or supplementing existing minutes,<sup>249</sup> defense counsel should be wary of relying on objections based on the scope of the minutes. During the investigation of the case and use of formal discovery, defense counsel should take into consideration the

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241. *Id.* at 190-91. Iowa Rule of Criminal Procedure 2.19(2)-(3), which is the current version of Rule 18(3), applies to additional witnesses who will be called by the state, not to additional information added to the minutes of existing witnesses. IOWA R. CRIM. P. 2.19(2)-(3).

242. *State v. Nebinger*, 412 N.W.2d at 191.

243. *Id.* (quoting IOWA R. CRIM. P. 13(5)). The current version of Rule 13.5 is enumerated as Rule 2.14(2)(a)(1).

244. *Id.*

245. *State v. Wells*, 522 N.W.2d 304, 307 (Iowa Ct. App. 1994).

246. *Id.* (quoting IOWA R. CRIM. P. 4(8)(a), (e); *State v. Braun*, 495 N.W.2d 735, 741 (Iowa 1993)).

247. *Id.* (citing *State v. Walker*, 281 N.W.2d 612, 613 (Iowa 1979)).

248. *See* IOWA R. CRIM. P. 2.19(2)-(3).

249. *See* IOWA R. CRIM. P. 2.4(8)(a), (e).

risks involved with an adverse ruling on a scope of minutes objection at trial; such a ruling will necessitate a recess, conducting additional discovery, and potential restructuring of the defense's strategy.

#### V. FORMAL DISCOVERY OR NOT—THE DUTY TO INVESTIGATE

In light of the discussion of what minutes of testimony can and cannot do, counsel is confronted with two questions: (1) what information does the state potentially possess, and (2) whether formal discovery should be conducted. Each year, changes in investigative techniques and science increase the number and nature of sources of information. Each case is different, and the nature and sources of information will obviously change. What may be the focus of an investigation in an operating while intoxicated case will vary from the focus of an investigation in a tax fraud case. With the expanding use of computers, disks, hard drives, and tapes, technology has impacted the courtroom in a dramatic fashion. Drafting motions and conducting depositions require the defense lawyer to take command of a new vocabulary for each case. Even the term "document" is no longer as accurate as it once was, due to the use of computer diskettes to store information. The need for the lawyer to expand his or her knowledge of an area to be investigated is as necessary as an understanding of the rules of evidence. Knowing one without the other can be lethal to the representation of the client. There are also time constraints placed on the attorney to make decisions very soon after receiving a case, making the attorney's investigation all the more arduous.

In Iowa, a county attorney has forty-five days to indict a criminal defendant following arrest.<sup>250</sup> The defendant's trial date is usually set shortly after arraignment.<sup>251</sup> After the arraignment, defense counsel must take depositions within thirty days<sup>252</sup> and file motions within forty days.<sup>253</sup> Usually, defense counsel has little time to make decisions regarding discovery. It is vital to develop an investigative strategy quickly in order to take advantage of Iowa's expanded discovery.

The advantages of formal discovery may be outweighed by its disadvantages. If counsel elects to use formal discovery, reciprocal

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250. IOWA R. CRIM. P. 2.33(2)(a).

251. *See id.* R. 2.9(1) (requiring a court to set the date and time for a defendant's trial within seven days after the entry of an oral plea of not guilty of the filing of a written plea of not guilty).

252. *Id.* R. 2.13(6).

253. *Id.* R. 2.11(4).

discovery is triggered for depositions<sup>254</sup> and motion practice.<sup>255</sup> Other complaints are that depositions simply provide a “rehearsal” for the state’s witnesses and expose weaknesses in the state’s case early enough for the state to correct.<sup>256</sup> The disadvantage of informal discovery is the potential of becoming a witness in the case counsel is investigating. The ABA Standards for Criminal Justice provide:

Relations With Prospective Witnesses

(a) Defense counsel, in representing an accused, should not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) Defense counsel should not compensate a witness, other than an expert, for giving testimony, but it is not improper to reimburse a witness for the reasonable expenses of attendance upon court, including transportation and loss of income, attendance for depositions pursuant to statute or court rule, or attendance for pretrial interviews, provided there is no attempt to conceal the fact of reimbursement.

(c) It is not necessary for defense counsel or defense counsel’s investigator, in interviewing a prospective witness, to caution the witness concerning possible self-incrimination and the need for counsel.

(d) Defense counsel should not discourage or obstruct communication between prospective witnesses and the prosecutor. It is unprofessional conduct to advise any person other than a client, or cause such person to be advised, to decline to give to the prosecutor or defense counsel for codefendants information which such person has a right to give.

(e) Unless defense counsel is prepared to forgo impeachment of a witness by counsel’s own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present such impeaching testimony, defense counsel should avoid interviewing a prospective witness except in the presence of a third person.<sup>257</sup>

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254. See *id.* R. 2.13(3) (“[D]efendant shall file a written list of names and addresses of witnesses expected to be called for the defense . . . . Such witnesses shall be subject to being deposed by the state.”).

255. See *id.* R. 2.14(3) (stating that if the court grants relief under Rule 2.14(2)(b)(1) or 2.14(2)(b)(2), the court may, upon motion of the state, order the defendant to permit the state to inspect documents, tangible objects, reports of examinations, and tests).

256. See *id.* R. 2.4(8)(a), (e) (stating that the court can amend the indictment and minutes, before or during trial, “so as to correct errors or omissions in matters of form of substance”).

257. ABA STANDARDS, *supra* note 1, at Standard 4-4.3.

In *State v. Vanover*,<sup>258</sup> defense counsel contacted a codefendant who was in custody without obtaining permission from the codefendant's attorney.<sup>259</sup> Counsel later interviewed a second codefendant without inquiring as to whether the person was represented by an attorney.<sup>260</sup> Both interviews were exculpatory to defense counsel's client, who was also on parole.<sup>261</sup> During the defendant's parole hearing, his parole lawyer called the defense lawyer who had taken the codefendant's statements to testify.<sup>262</sup> The defense lawyer was later listed as a state's witness to testify about the statements made by the codefendants.<sup>263</sup> Vanover's lawyer then moved to sever his trial from the other defendants' because he was now listed as a witness against the codefendants.<sup>264</sup> The trial court disqualified the attorney,<sup>265</sup> and the appellate court upheld the decision, finding: "The potential conflict as we have outlined was serious because it might imperil Vanover's right to adequate representation, jeopardize the integrity of the trial process, and diminish the prospect of a fair trial with a just, reliable result."<sup>266</sup>

The Iowa Supreme Court dealt simply and directly with the question of interviewing witnesses by directing counsel to "interview witnesses in the presence of third parties."<sup>267</sup> Although commented on, the court did not specifically address the ethical propriety of interviewing the codefendants without advising and securing the consent of their respective attorneys.<sup>268</sup> This practice is clearly prohibited.<sup>269</sup> *Vanover* thus advises

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258. *State v. Vanover*, 559 N.W.2d 618 (Iowa 1997).

259. *Id.* at 623. Attorneys are prohibited from communicating or "caus[ing] another to communicate with a party known to be represented by a lawyer." IOWA CODE OF PROF'L RESPONSIBILITY DR 7-104(A)(1) (2004).

260. *State v. Vanover*, 559 N.W.2d at 623.

261. *See id.* (stating that the first codefendant signed a statement that Vanover was not even present when the drug deal occurred and that the second codefendant stated that Vanover did not know of the drug activities and that codefendant Howard was the one who had sold the drugs).

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.* at 624.

266. *Id.* at 631 (citation omitted).

267. *Id.* at 634.

268. *See id.* at 628 (stating that the appearance of impropriety that was created by taking the codefendants' statements was not the main issue).

269. *See* IOWA CODE PROF'L RESPONSIBILITY DR 7-104 (2004) (prohibiting counsel from communicating with represented parties without the consent of that party's attorney).

counsel to: (1) ask if a witness is represented by counsel and secure the attorney's permission before conducting the interview<sup>270</sup> and (2) have a third party present during the interview.<sup>271</sup>

It is important to compile a witness list as soon as it is practical. The list should contain the witness's name, address, phone number, work number, and relationship with the client. The first set of witnesses can be obtained from the client and should be interviewed with a focus on what they know about the case. Although most witnesses in this category can be considered friendly, the attorney should still exercise care during the interview. If the attorney becomes an adversarial witness against his or her client, the lawyer must withdraw from the case.<sup>272</sup>

Many attorneys have attempted to correct problems with statements by tape-recording the conversation with the witness. Care should be taken when conversations with a client or witness are tape-recorded. It is unethical to tape-record a witness or client without his or her knowledge and consent.<sup>273</sup> Attorneys should clearly identify themselves, the party they represent, and the fact that the conversation is being recorded in the interview so no questions will be raised about the recording.

A potential witness's credibility will be judged by the jury based on instructions received from the court. Reviewing the jury instructions that apply to witnesses and witness credibility will assist in evaluating the witness's testimony. The instructions give a list of factors as examples of some of the many the jurors may consider in evaluating credibility.<sup>274</sup> By consulting the instructions, the attorney may prepare witnesses accordingly and prepare cross-examination for opposing counsel's witnesses.

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270. State v. Vanover, 559 N.W.2d at 628.

271. *Id.* at 634.

272. IOWA CODE OF PROF'L RESPONSIBILITY DR 5-102(A). If the lawyer becomes a witness for someone other than his client, "the lawyer may continue the representation until it is apparent that the testimony is or may be prejudicial to the client." *Id.* DR 5-102(B).

273. Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Plumb, 546 N.W.2d 215, 217 (Iowa 1997) (citing IOWA CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(4)); Comm. on Prof'l Ethics and Conduct of the Iowa State Bar Ass'n v. Mollman, 488 N.W.2d 168, 170 (Iowa 1992)).

274. IOWA STATE BAR ASS'N, IOWA CRIMINAL JURY INSTRUCTIONS 100.7 (1988) (suggesting that jurors consider whether the reasonableness of the testimony and its consistency with other testimony they believe to be true, inconsistencies in the witness's statements, the witness's memory and knowledge of the facts, the witness's appearance, age, conduct, intelligence, motive, candor, bias, prejudice, and interest in the trial).

Whether the fact investigation is conducted through formal or informal means, it is clear that the duty to investigate must be pursued to avoid a claim of ineffective assistance of counsel. In *Wiggins v. Smith*,<sup>275</sup> the United States Supreme Court held that defense counsel provided ineffective assistance by failing to conduct an adequate investigation in a death penalty case.<sup>276</sup> With regard to investigation, the Court stated:

In light of these standards, our principal concern in deciding whether [defense counsel] exercised “reasonable professional judgment,” is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel’s decision not to introduce mitigating evidence of [the defendant’s] background was itself reasonable. In assessing counsel’s investigation, we must conduct an objective review of their performance, measured for “reasonableness under prevailing professional norms,” which includes a context-dependent consideration of the challenged conduct as seen “from counsel’s perspective at the time.”<sup>277</sup>

The Court went on, citing the ABA standards:

The ABA Guidelines provide that investigations into mitigating evidence “should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.” Despite these well-defined norms, however, counsel abandoned their investigation of petitioner’s background after having acquired only rudimentary knowledge of his history from a narrow set of sources.<sup>278</sup>

The message of *Wiggins* is clear—failure to conduct adequate fact investigation is grounds for a finding of ineffective assistance of counsel, and counsel who ignore ABA standards do so at their own peril.<sup>279</sup>

#### VI. THE SEARCH FOR EXCULPATORY INFORMATION—A PROSECUTOR’S ETHICAL OBLIGATION TO DISCLOSE

The American Bar Association standard regarding a prosecutor’s

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275. *Wiggins v. Smith*, 123 S. Ct. 2527 (2003).

276. *Id.* at 2544.

277. *Id.* at 2536 (citations omitted) (alteration in original).

278. *Id.* at 2537 (citations omitted).

279. *See id.* at 2541-44 (holding that counsel’s fact investigation constituted ineffective assistance of counsel under *Strickland*).

duty to disclose states:

(A) A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.

(B) A prosecutor should not fail to make a reasonably diligent effort to comply with a legally proper discovery request.

(C) A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused.<sup>280</sup>

The Iowa Code of Professional Responsibility echoes the ABA standards in part by providing:

A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if unrepresented by counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.<sup>281</sup>

In *Gordon v. State*,<sup>282</sup> the defendant was charged with first-degree murder.<sup>283</sup> Gordon raised the defense of diminished responsibility due to alcohol and drug intoxication.<sup>284</sup> His attorney wanted to call a codefendant to testify in support of Gordon's defense.<sup>285</sup> The codefendant raised her Fifth Amendment privilege against self-incrimination and refused to make a pretrial statement.<sup>286</sup> She was not called as a witness, and Gordon was convicted.<sup>287</sup> One month after Gordon's sentencing, the murder charges against the codefendant were dismissed.<sup>288</sup> After Gordon's conviction was affirmed,<sup>289</sup> he brought a postconviction action alleging prosecutorial misconduct based on a claim of calculated delay of the dismissal of the

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280. ABA STANDARDS, *supra* note 1, at Standard 3-3.11.

281. IOWA CODE OF PROF'L RESPONSIBILITY DR 7-103(B) (2004).

282. *Gordon v. State*, 480 N.W.2d 265 (Iowa Ct. App. 1991).

283. *Id.* at 266.

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *State v. Gordon*, 354 N.W.2d 783, 785 (Iowa 1984).

charges against the codefendant.<sup>290</sup>

The crux of Gordon's argument was that the state intentionally waited until after Gordon's sentencing to dismiss the case against the codefendant in order to deprive him of the codefendant's exculpatory testimony.<sup>291</sup> The Iowa Court of Appeals found the defendant must show, by a preponderance of the evidence, that (1) the prosecutor is guilty of misconduct, and (2) the defendant suffered actual prejudice.<sup>292</sup> The court affirmed the trial court's finding that no prosecutorial misconduct occurred because that conclusion was supported by substantial evidence.<sup>293</sup> The court further held Gordon was not prejudiced and observed that although Gordon claimed the testimony of the codefendant was critical, he did not present the codefendant, nor present any reason as to why he did not call her at the postconviction proceeding.<sup>294</sup> This failure undercut his argument and left the court to speculate about the effect of the proposed testimony.<sup>295</sup> Needless to say, the court declined the invitation.<sup>296</sup>

Gordon's argument goes beyond traditional nondisclosure by a prosecutor. Gordon's central point is the prosecutor intentionally acted to frustrate the defense's attempts to secure favorable testimony.<sup>297</sup> In order to establish the proposition, the state must admit its ill motive, or the codefendant must testify. However, it is unlikely that a prosecutor would admit the state intentionally maintained a frivolous charge against someone in order to deprive the defendant of a witness. This leaves the defense with the second option: calling the former codefendant to testify. However, there are at least two practical problems in presenting testimony by the codefendant at a postconviction hearing: (1) due to the length of time between defendant's initial criminal trials and postconviction

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290. Gordon v. State, 480 N.W.2d at 266.

291. *Id.* The first argument presented by the state was that Gordon had waived the issue by not raising it on direct appeal. *Id.* at 266-67. The court of appeals rejected the State's argument and found that the dismissal was not part of the record in the criminal case and that the dismissal occurred after time had expired for the filing of the notice of appeal. *Id.* at 267. It would seem that the State, by making this argument, reinforced the defendant's contention that dismissal was made in order to deny him access to a witness.

292. *Id.* at 268.

293. *Id.*

294. *Id.*

295. *Id.* at 269. ("We determine it cannot be concluded Loper's testimony would have made a difference. Gordon has failed to demonstrate the required prejudice.").

296. *Id.*

297. *Id.* at 266.



proceedings, the codefendant may not be available, and (2) assuming the codefendant is available, her testimony may implicate her in other criminal activity, causing the state to refocus on her part in the criminal act. Although these are hurdles defense counsel must overcome, the Iowa Supreme Court has acted when it has been determined that a prosecutor has not disclosed exculpatory evidence.

In *Committee on Professional Ethics and Conduct of the Iowa State Bar Association v. Ramey*,<sup>298</sup> the Iowa Supreme Court suspended a prosecutor's license for nondisclosure of exculpatory evidence.<sup>299</sup> In *Ramey*, defense counsel filed a motion to produce "all exculpatory evidence," which was sustained by the court.<sup>300</sup> The prosecutor received police reports and an interview from a witness who claimed the theft was committed by a third party, not the defendant.<sup>301</sup> The information was not disclosed to the defendant.<sup>302</sup> The ethics commission found the prosecutor breach the duty to disclose.<sup>303</sup> The prosecutor argued the information was governed by *Brady v. Maryland*<sup>304</sup> materiality standard.<sup>305</sup> The prosecutor contended he was not required to disclose the information because it was nonmaterial.<sup>306</sup> If the information was not material, then it need not be disclosed.<sup>307</sup> The Iowa Supreme Court, rejecting the argument, found that "[the] statement was material and the defense was entitled to it. The duty to disclose exculpatory evidence cannot be ignored because of a prosecutor's private belief that it is beside the point."<sup>308</sup>

The importance of the *Ramey* decision is the Iowa Supreme Court's clear statement that nondisclosure is an ethical violation.<sup>309</sup> This decision

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298. Comm. on Prof'l Ethics & Conduct of the Iowa State Bar Ass'n v. Ramey, 512 N.W.2d 569 (Iowa 1994).

299. *Id.* at 572 ("We direct that the respondent[s] . . . license to practice law . . . be suspended indefinitely, with no possibility of reinstatement for three months . . .").

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.* (finding that Ramey's conduct violated "the ethical duty to disclose").

304. *Brady v. Maryland*, 373 U.S. 83 (1963).

305. Comm. on Prof'l Ethics & Conduct of the Iowa State Bar Ass'n v. Ramey, 512 N.W.2d at 572.

306. *Id.*

307. *Id.*

308. *Id.*

309. *See id.* (holding the prosecutor violated DR 7-103(B) by not disclosing the exculpatory evidence).

should assist defense counsel in ensuring pretrial disclosure of information by the prosecution. The consequence of nondisclosure—in Ramey’s case, suspension of his license<sup>310</sup>—should give prosecutors every incentive to disclose. Defense counsel must file a pretrial request for disclosure. Its necessity becomes clear in reviewing the applicable case law.

## VII. A DUE PROCESS OBLIGATION TO DISCLOSE

In *Brady v. Maryland*, a codefendant made a pretrial statement confessing that he committed the murder in question.<sup>311</sup> In spite of a pretrial request made by Brady’s attorney to examine any statements made by the codefendant, the exculpatory statement was not disclosed “until after he had been tried, convicted, and sentenced, and after his conviction had been affirmed.”<sup>312</sup> Brady’s trial strategy was to concede participation in the murder, but to claim the codefendant had actually committed the murder, thus minimizing his involvement.<sup>313</sup> This strategy, if successful, would assure a conviction for murder, but would avoid the death penalty.<sup>314</sup> The Maryland Court of Appeals remanded the case for retrial only on the issue of the imposition of the death penalty.<sup>315</sup> The United States Supreme Court, in affirming the ruling of the Maryland appellate court, ruled: “We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”<sup>316</sup>

As a precondition to a due process violation for nondisclosure, a request for the exculpatory evidence must be filed.<sup>317</sup> Defense counsel who do not file such a request do so at their client’s peril.<sup>318</sup> This was the case in

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310. *Id.*

311. *Brady v. Maryland*, 373 U.S. 83, 84 (1963).

312. *Id.*

313. *Id.*

314. *Id.* at 84-85.

315. *Id.* at 88 (reasoning that retrial as to Brady’s guilt or innocence was not necessary because nothing in the suppressed confession “could have reduced the appellant Brady’s offense below murder in the first degree”).

316. *Id.* at 87.

317. *See United States v. Agurs*, 427 U.S. 97, 106 (1976) (stating that the materiality test in *Brady* is not the same as in cases where the defense made no request for exculpatory evidence).

318. *See id.* at 108 (stating that the prosecutor does not have an obligation to disclose all information that might affect a jury’s verdict).

*United States v. Agurs*.<sup>319</sup>

Linda Agurs was convicted of second-degree murder for the stabbing death of James Sewell.<sup>320</sup> The defense raised the issue of self-defense and claimed the prosecutor's failure to disclose background information of the victim warranted a new trial.<sup>321</sup> The prosecution argued that because defense counsel did not request the information, the government was not obligated to disclose the victim's criminal record.<sup>322</sup> The D.C. Circuit agreed with the defense that the nondisclosure violated the defendant's right to due process.<sup>323</sup> In reversing the D.C. Circuit, the United State Supreme Court found the government had not violated the defendant's right to due process.<sup>324</sup>

The Court in *Agurs* attempted to define three areas of nondisclosure: (1) perjured testimony that the prosecution knew or should have known was perjury,<sup>325</sup> (2) information specifically requested by the defense but suppressed by the prosecution,<sup>326</sup> and (3) information when no request or a general request has been filed.<sup>327</sup> In elaborating on the three categories, the Court found that in a case of perjured testimony:

[T]he undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury. In a series of subsequent cases, the Court has consistently held that a conviction obtained by the knowing use of perjured testimony 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.<sup>328</sup>

In a case such as *Brady*, when a specific request is made, the Court noted:

Although there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor, if the

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319. *United States v. Agurs*, 427 U.S. 97 (1976).

320. *Id.* at 98.

321. *Id.* at 100-01.

322. *Id.* at 101.

323. *Id.* at 101-02.

324. *Id.* at 102.

325. *Id.* at 103 (citing *Mooney v. Holohan*, 294 U.S. 103 (1935)).

326. *Id.* at 104 (citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)).

327. *Id.* at 106-07.

328. *Id.* at 103 (footnotes omitted).

subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge. When a prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.<sup>329</sup>

In the third category of cases, either no request is made or a general request for “anything exculpatory” or “all *Brady* material” is made.<sup>330</sup> The Court found that such a general request “gives the prosecutor no better notice than if no request is made.”<sup>331</sup> In such cases, the nondisclosure will not warrant a new trial unless a “constitutional” standard of materiality is violated.<sup>332</sup> The Court stated:

The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that 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. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.<sup>333</sup>

The Court found that the district court applied the correct standard to the facts presented in *Agurs*, and appropriately overruled the defendant’s motion for a new trial because no constitutional standard of materiality was violated.<sup>334</sup>

The Court further refined the language used to define materiality in *United States v. Bagley*.<sup>335</sup> In *Bagley*, two government witnesses had entered into contracts with the government to provide information in

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329. *Id.* at 106.

330. *Id.*

331. *Id.* at 106-07.

332. *Id.* at 112-13 (stating that there is no justification for a new trial if there is no reasonable doubt about the defendant’s guilt).

333. *Id.* (footnotes omitted).

334. *Id.* at 113-14.

335. *United States v. Bagley*, 473 U.S. 667 (1985).

exchange for a lump-sum payment.<sup>336</sup> This information was not supplied to the defendant<sup>337</sup> even though defense counsel had filed a motion to produce any “deals, promises, or inducements” between the government and its witnesses.<sup>338</sup> The defendant filed to vacate his sentence.<sup>339</sup> After an evidentiary hearing before a magistrate judge:

The District Court found beyond a reasonable doubt, however, that had the existence of the agreements been disclosed to it during the trial, the disclosure would have no effect upon its finding that the Government had proved beyond a reasonable doubt that [the defendant] was guilty of the offenses for which he had been convicted.<sup>340</sup>

The district court applied the *Agurs* standard.<sup>341</sup>

In setting a new standard of materiality, the Supreme Court relied on *Strickland v. Washington*.<sup>342</sup> In *Strickland*, the Court set the standard for granting a new trial based on ineffective assistance of counsel, stating “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”<sup>343</sup> The Court in *Bagley* concluded:

We find the *Strickland* formulation of the *Agurs* test for materiality sufficiently flexible to cover the “no request,” “general request,” and “specific request” cases of prosecutorial failure to disclose evidence favorable to the accused: The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A “reasonable probability” is a probability sufficient to undermine confidence in the outcome.<sup>344</sup>

In view of the language adopted by the Court, why file a specific

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336. *Id.* at 671.

337. *Id.*

338. *Id.* at 669-70.

339. *Id.* at 671-72.

340. *Id.* at 673.

341. *See id.* at 682 (noting that suppression of evidence will not be material unless there is a reasonable probability that the result of the proceeding would have been different).

342. *Id.* (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

343. *Strickland v. Washington*, 466 U.S. at 694.

344. *United States v. Bagley*, 473 U.S. at 682.

request for discovery? The test for materiality does not distinguish between cases in which no request is filed, in which a specific request is filed, or in which a general request is filed. The Court addressed the question:

We agree that the prosecutor's failure to respond fully to a *Brady* request may impair the adversary process in this manner. And the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption. This possibility of impairment does not necessitate a different standard of materiality . . . . The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response.<sup>345</sup>

*Bagley* was remanded to the district court for further findings using the Court's newly enunciated standard of materiality.<sup>346</sup> Although not determinative, a specific request emphasizes the importance of nondisclosure in a given case. It is clearly to counsel's advantage to file a pretrial motion for specific information to preserve the issue for further review, generate a heightened scrutiny in the event of nondisclosure, and put the prosecutor on notice.

In order to file a specific request, it appears that counsel would have to know what is in the prosecutor's file. This provokes the classic defense response: "If I knew the information existed, I wouldn't have to ask for it." Each case is different and will dictate its own investigative strategy. The attorney must begin by asking: (1) What type of information is or could be available to the prosecution?, and (2) Who are the witnesses? Once this has been determined, formulating specific requests tailored to the case becomes a more manageable task.

#### VIII. CASES OF NONDISCLOSURE

*Brady* was decided in 1963.<sup>347</sup> Even though forty years have passed,

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345. *Id.* at 682-83.

346. *Id.* at 684.

347. *Brady v. Maryland*, 373 U.S. 83 (1963).

the problem of nondisclosure still persists. The following discussion illustrates this point.

*A. The United States Supreme Court*

In *Kyles v. Whitley*,<sup>348</sup> the Court again returned to the subject of prosecutorial nondisclosure.<sup>349</sup> After a second trial, Mr. Kyles was convicted of first-degree murder and sentenced to death.<sup>350</sup> In the first trial, the state offered testimony from four eyewitnesses who were present at the crime scene.<sup>351</sup> Kyles offered an alibi—he was picking his children up from school at the time of the homicide—and claimed that he was being framed by another individual by the name of Beanie.<sup>352</sup> Beanie, an informant, contacted the police and focused the investigation on Kyles.<sup>353</sup> During the investigation, Beanie gave three internally inconsistent and contradictory statements and expressed concern about being a suspect in the homicide.<sup>354</sup> Prior to trial, “[defense] counsel filed a lengthy motion for disclosure by the State of any exculpatory or impeachment evidence.”<sup>355</sup> The prosecution replied that “there was no exculpatory evidence of any nature,” despite their knowledge of this and additional evidence.<sup>356</sup> After the first trial, the chief prosecutor interviewed Beanie, and again Beanie changed significant aspects of his account.<sup>357</sup> Although Kyles became the focus of the investigation because of Beanie’s statements, and Kyles had claimed Beanie was trying to frame him, Beanie was never called to testify.<sup>358</sup> Beanie’s only appearance was during rebuttal of the second trial when he was brought into the courtroom to stand beside Kyles so the eyewitness could testify the assailant was Kyles, not Beanie.<sup>359</sup> Beanie

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348. *Kyles v. Whitley*, 514 U.S. 419 (1995).

349. *Id.*

350. *Id.* at 421. Mr. Kyles’s first trial ended in a hung jury. *Id.*

351. *Id.* at 429.

352. *Id.*

353. *Id.* at 424. “A few hours later, the informant met New Orleans Detective John Miller, who was wired with a hidden body microphone, through which the ensuing conversation was recorded. . . . The informant now said his name was Joseph Banks and that he was called Beanie. His actual name was Joseph Wallace.” *Id.*

354. *Id.* at 425-27.

355. *Id.* at 428.

356. *Id.* at 428-29.

357. *Id.* at 429-30.

358. *Id.* at 430.

359. *Id.* at 431.

subsequently received \$1,600 in reward money.<sup>360</sup> In subsequent proceedings, the state conceded that “Beanie was essential to [the] investigation and, indeed, ‘made the case’ against Kyles.”<sup>361</sup>

Also unknown to Kyles’s attorney were prior statements given by the prosecution’s eyewitnesses that contradicted their trial testimony.<sup>362</sup> The Court noted: “Disclosure of their statements would have resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense. To begin with, the value of two of those witnesses would have been substantially reduced or destroyed.”<sup>363</sup>

Another item of evidence not disclosed to the defense was a list of vehicles located in a parking lot after the murder.<sup>364</sup> The state contended that the killer drove to the lot and left his vehicle there during the investigation.<sup>365</sup> The list compiled by the police did not reveal Kyles’s vehicle.<sup>366</sup>

The Court found that the collective effect of the items of evidence suppressed by the state “‘undermine[d] confidence’”<sup>367</sup> in the verdict and reversed the conviction.<sup>368</sup> The Court commented:

While the definition of *Bagley* materiality in terms of the cumulative effect of suppression must accordingly be seen as leaving the government with a degree of discretion, it must also be understood as imposing a corresponding burden. On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of “reasonable probability” is reached. This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government’s behalf in the case, including the

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360. *Id.*

361. *Id.* at 445.

362. *Id.* at 441-42.

363. *Id.* at 441.

364. *Id.* at 450.

365. *Id.*

366. *Id.*

367. *Id.* at 434 (quoting *United States v. Bagley*, 473 U.S. 667, 678 (1985)).

368. *Id.* at 454.



police.<sup>369</sup>

### B. *The Eighth Circuit*

In *United States v. Kime*,<sup>370</sup> the defendant was charged with multiple counts of drug distribution, conspiracy, and firearm violations.<sup>371</sup> The prosecution based its case on wiretaps, video surveillance, codefendant testimony, and information from confidential informants.<sup>372</sup> Based on the information known to defense counsel, he outlined an investigative strategy, and in keeping with the distinctions drawn by the Supreme Court in *Agurs* and *Bagley*, he filed a motion for production of exculpatory information.<sup>373</sup>

*Kime* presented an interesting twist. The prosecution discovered a “romantic entanglement” between several of its incarcerated witnesses and their female jailers.<sup>374</sup> The witnesses received expanded visiting privileges, catered food, access to otherwise off-limits areas inside the jail, areas outside the jail, computer records, and sexual contact with the female jailers.<sup>375</sup> This information was provided to the district court prior to trial.<sup>376</sup> However, it was not disclosed to defense counsel until two of the three offending witnesses had testified and the third was being cross-examined.<sup>377</sup> The Eighth Circuit found a *Brady* violation did not occur because counsel was advised of the information, cross-examined one witness extensively, and called one of the female guards to divulge the details of the romantic involvement.<sup>378</sup> The court held that “*Brady* does not require pretrial disclosure as long as the ultimate disclosure is made before it is too late for the defendant to make use of any benefits of the evidence.”<sup>379</sup>

The court did not address, nor did the record disclose, why the trial

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369. *Id.* at 437.

370. *United States v. Kime*, 99 F.3d 870 (8th Cir. 1996).

371. *Id.* at 876.

372. *Id.* at 876, 878.

373. Motion for Production of Exculpatory Evidence, *United States v. Kime* (S.D. Iowa 1994) (No. 94-CR-52) (on file with the Clerk of Court for the United States District Court for the Southern District of Iowa, Central Division).

374. *United States v. Kime*, 99 F.3d at 881.

375. *Id.* at 882.

376. *Id.* at 881.

377. *Id.*

378. *Id.*

379. *Id.* at 882. (quoting *Nassar v. Sissel*, 792 F.2d 119, 121 (8th Cir. 1986)).

court waited to make the disclosure. This presented a dilemma for defense counsel. After filing an extensive motion for exculpatory evidence concerning the prosecution witnesses,<sup>380</sup> counsel was given the information after two of the three witnesses had testified.<sup>381</sup> The information must have concerned the prosecution enough for the prosecutor to make a pretrial disclosure to the court. Why the court did not disclose this information to the defense before trial is curious at best. But it does highlight defense counsel's common concern that even the most carefully crafted motion to disclose cannot anticipate every contingency. It also emphasizes the importance of preparing and filing the motion. Without the motion, the information may have never surfaced. If the information was not revealed until after the conclusion of trial, without the heightened scrutiny provided by the motion, it is doubtful the court would have granted a new trial. Although unclear from the record, it can be inferred the motion caused the pretrial disclosure to the court. Although the information was given to defense counsel under less than ideal conditions, it was disclosed and counsel had an opportunity to use the information.

### C. *The Iowa Supreme Court*

In *Harrington v. State*,<sup>382</sup> the Iowa Supreme Court reversed a murder conviction for nondisclosure of exculpatory evidence.<sup>383</sup> Harrington's conviction dated back to 1978 and was based on the murder of a security guard at a car dealership.<sup>384</sup> His conviction was based primarily on testimony of a juvenile accomplice.<sup>385</sup>

The accomplice testified that he, Harrington, and another juvenile went to an auto dealership to steal a vehicle.<sup>386</sup> According to the accomplice, Harrington was armed with a shotgun.<sup>387</sup> He stated that Harrington and the other juvenile walked around a building in order to steal a vehicle.<sup>388</sup> Shortly thereafter, the accomplice heard a shot, and

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380. Motion for Production of Exculpatory Evidence, *United States v. Kime* (S.D. Iowa 1994) (No. 94-CR-52) (on file with the Clerk of Court for the United States District Court for the Southern District of Iowa, Central Division).

381. *United States v. Kime*, 99 F.3d at 882.

382. *Harrington v. State*, 659 N.W.2d 509 (Iowa 2003).

383. *Id.* at 512.

384. *Id.* at 514.

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.*

Harrington and the other juvenile returned to the vehicle.<sup>389</sup> The accomplice testified that Harrington stated he shot a cop.<sup>390</sup>

In the original trial, the accomplice was impeached with prior statements in which he identified three other men, who all had alibis, before naming Harrington as the killer.<sup>391</sup> The accomplice's credibility was further impeached because he had first identified the weapon as a pistol, a twenty-gauge shotgun and finally a twelve-gauge shotgun.<sup>392</sup> He also admitted to being a "confessed liar"<sup>393</sup> as well as visiting the crime scene with the prosecution.<sup>394</sup> In exchange for his testimony, various charges against the accomplice were dismissed.<sup>395</sup>

Harrington presented an alibi defense that was rebutted by the friends of the accomplice.<sup>396</sup> Harrington was convicted and sentenced to life in prison without parole and unsuccessfully attacked the conviction on appeal and through postconviction relief petitions.<sup>397</sup>

During Harrington's incarceration, a layperson became interested in his case and ultimately secured a set of police reports relating to the 1977 homicide investigation.<sup>398</sup> The reports included information regarding another suspect.<sup>399</sup> The reports revealed that the victim had submitted a written request for additional lighting days before the murder, due to an incident in which he observed someone attempting to get in a vehicle.<sup>400</sup> In addition, a civilian witness observed a man armed with a shotgun running with a dog in the vicinity.<sup>401</sup> Another witness identified the other suspect from a photograph.<sup>402</sup> The police found the alternative suspect, Gates, questioned him, and gave him a polygraph test that was interpreted as "not truthful in his denial of owning a shotgun or having shot [the

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389. *Id.*

390. *Id.*

391. *Id.*

392. *Id.*

393. *Id.*

394. *Id.* at 515.

395. *Id.*

396. *Id.*

397. *Id.* (citing *State v. Harrington*, 284 N.W.2d 244 (Iowa 1979); *Harrington v. State*, 458 N.W.2d 874 (Iowa Ct. App. 1990); *Harrington v. Nix*, 983 F.2d 872 (8th Cir. 1993)).

398. *Id.* at 518 & n.8.

399. *Id.* at 518.

400. *Id.*

401. *Id.*

402. *Id.*

victim].”<sup>403</sup> Reports also showed that Gates was a suspect in a fourteen-year-old unsolved murder in a neighboring city<sup>404</sup> and that he had three dogs.<sup>405</sup> None of this information was disclosed to defense counsel, even though defense counsel knew that a paw print was recovered from the crimes scene.<sup>406</sup>

Prior to filing the second postconviction relief petition, counsel obtained several recantations of the state’s primary witnesses.<sup>407</sup> The accomplice testified that he had made up the testimony in order to avoid charges and receive a reward.<sup>408</sup> The information about the reward was indirectly corroborated by the previously undisclosed police reports, which made references to offers of money for information.<sup>409</sup> The witness who testified to rebut Harrington’s alibi testified at the second postconviction hearing “that she knew nothing about Harrington’s involvement in the murder.”<sup>410</sup>

The Iowa Supreme Court found that there was a due process violation because the prosecution had violated its duty to disclose.<sup>411</sup> The court relied upon the requirements to maintain a due process claim that the United States Supreme Court had enunciated in *Brady v. Maryland*.<sup>412</sup> In

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403. *Id.* at 519.

404. *Id.*

405. *Id.*

406. *Id.*

407. *Id.* at 516-17.

408. *Id.* at 517.

409. *Id.*

While there was no documentation in police records that Hughes had been offered a reward, one of the previously undisclosed police reports indicated that the police had “put the word out what we had to offer and what we wanted in return.” This same report, dated July 27, 1977, stated that “officers made several other contacts this evening [July 25, 1977] putting out information money,” and that the next day, “[s]ome of the contacts started to make contact back to [the police].” This report identified one individual by name who “was offered money if he could come up with something,” and another potential witness “who was also offered information money.”

*Id.* (alterations in original).

410. *Id.*

411. *Id.* at 525.

412. *Id.* at 521-22 (“Harrington must prove ‘(1) the prosecution suppressed evidence; (2) the evidence was favorable to the defendant; (3) the evidence was material to the issue of guilt.’”) (quoting *State v. Veal*, 564 N.W.2d 797, 810 (Iowa 1997)).

analyzing Harrington's claim, the court stated:

This test does not mean, however, that evidence unknown to the individual prosecutor is not considered suppressed. The prosecutor "has a duty to learn of any favorable evidence known to . . . others acting on the government's behalf in the case, including the police." Regardless of whether the prosecutor actually learns of the favorable evidence, the prosecution bears the responsibility for its disclosure. Thus, it is the fact of nondisclosure that is important; "[t]he good faith or bad faith of the prosecution in failing to produce the evidence" is not.<sup>413</sup>

The case against Mr. Harrington was ultimately dismissed.

## IX. CONCLUSION

The duty to investigate and the duty to disclose are two sides of the same coin. The purpose of each is to ensure a citizen charged with a crime a fair trial. Defense counsel who ignore the duty to investigate risk a finding of ineffective assistance. Prosecutors who do not disclose risk a finding of prosecutorial misconduct.

Given the litigation spurred by *Brady*, *Agurs*, and *Kyles*, and the ethical obligation to disclose,<sup>414</sup> prosecutors would presumably divulge any information that would be remotely classified as exculpatory. After all, if the information is helpful to the prosecutor, disclosure may mean an early settlement. Moreover, if it is not helpful, why risk the possibility of a new trial if it meets the *Bagley* standard of materiality? It appears that nondisclosure serves no legitimate prosecutorial goal, assuming the prosecution's goal is to serve justice and not merely to seek convictions.<sup>415</sup>

Unfortunately, such aspirant goals are often treated as musings and are simply not adhered to in practice. The pressure to maintain a high conviction rate for political purposes is the driving force in most, if not all, prosecution offices. In cases of reversals, it is politically more desirable to blame courts for retrials than to accept responsibility for nondisclosure.

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413. *Id.* at 522 (citations omitted) (alteration in original).

414. ABA STANDARDS *supra* note 1, at Standard 3-3.11.

415. ABA STANDARDS *supra* note 1, at Standard 3-1.2(c).