Terri Wood
OSB 88332
730 Van Buren Street
Eugene, Oregon 97402

Attorney for Defendant

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR MULTNOMAH COUNTY

STATE OF OREGON, Plaintiff, -VS- XX, Defendant	CASE No. XX MEMORANDIM OF LAW IN SUPPORT OF DEFENDANT'S REQUEST FOR DISCOVERY

I. STATUTORY DISCOVERY RIGHTS

ORS 135.805-135.873, the pretrial discovery statutes, were enacted to provide mandatory, automatic disclosure of information in the possession of the State to the defense. Disclosure is required to minimize surprise at trial, avoid prolonged trials and provide adequate information for informed pleas and an evaluation of cases before trial. See generally, Margolin, "The Oregon Court of Appeals and Statutory Pretrial Discovery," 18 Willamette LR 279 (1982).

The Court of Appeals discussed the policies underlying our discovery statutes in *State v. Dickerson*, 36 OrApp 479 (1978), arising out of a Lane County prosecution for sexual abuse. On appeal the defendant sought reversal of his conviction because the trial court failed to exclude the victim's dress and a photograph of her dress which were not disclosed as statutorily required. The state's case involved a claim by the victim that defendant had fondled

her through her pantyhose, while the defendant claimed the only contact was a mutual voluntary kiss. The prosecution obtained possession of the dress during the trial, after being alerted that the length of the dress would be an issue, with defense witnesses claiming it was a "miniskirt."

"The prosecuting attorney concluded his cross-examination [of one of these witnesses] with questions which were clearly intended to suggest that the witness might be lying about the dress to help defendant." 36 Or App at 483. The prosecutor did the same with the defendant's testimony, and then offered the dress and photograph of the victim in the dress to impeach the defendant. 36 Or App at 485. The court offered the defense a continuance, which counsel rejected on the basis that it would not cure the effect of the prosecution's surprise tactics.

The appellate court observed that "[t]he criminal discovery statutes were intended to minimize surprise and to eliminate 'trial by ambush'," 36 Or App at 485. The court went on to note the discovery rules were adopted from the ABA Standards, and quoted the following commentary:

> Generally, an attorney can be effective in a trial only to the extent he has the information necessary to plan effectively. Quick wits may be the mark of the trial lawyer, but they are not always sufficient for the orderly exposition and testing of evidence, which is the purpose of a trial. Where planning is foreclosed by lack of information, as has long been the custom in much criminal litigation, surprise and gamemanship usually govern the conduct of the proceedings. The result is too often a general obfuscation of the issues. In spite of its obvious entertainment qualities, trial gamesmanship by way of obfuscatory tactics is generally offensive to the dignity of the court as an institution and destructive of respect for legal processes. Where life, liberty and protection of communities from crime are the stakes, gamesmanship is out of place. 36 Or App at 485-86 (citation omitted).

To fulfill the legislative purposes behind the discovery statutes, this Court has the authority to regulate discovery. See, e.g., ORS 135.845(1)("court may supervise the exercise of discovery to insure that it proceeds *properly* and expeditiously")(emphasis supplied). The

defense submits that if the Court determines the State has the information sought herein, but has chosen to not reduce the information to writing so as to comply with the letter of the discovery statutes while circumventing the spirit of the statutes, the Court can order the State to disclose the information to the defense.

Trial courts generally have inherent authority to order disclosure. *See, State v. Koennecke,* 274 Or 169, 182 (1976); ORS 1.160 ("[I]f the course of proceeding is not specifically pointed out by the procedural statutes, any suitable process or mode of proceeding may be adopted . . . "); *see also, State v. McKendall*, 36 Or App 187, 196-97 (1978); *US v. Nobles,* 422 US 225, 231 91975)(noting the federal judiciary's "inherent power" to require disclosure of information necessary to the defense); *US v. Richter*, 488 F2d 170 (9th Cir. 1973)(trial court has discretion to require prosecutor to furnish the defense a witness list); *US v. Cadet*, 727 F2d 1453 (9th Cir. 1984)(discretion to order government to provide names and addresses of witnesses it does not intend to call).

In *McKendall*, the court reserved decision on the question of whether a trial court has the power under the discovery statutes to order the reduction of oral statements to writing if it determines that the oral statement was not reduced to writing to avoid discovery, citing *People v. Manley,* 19 Ill. App. 3d 365, __, 311 NE 2d 593, 597 (1973)(Prosecution was required to reduce to writing alleged oral statement of defendant to a witness who the State intended to use at trial). See also *State v. Hartfield,* 290 Or 583, 592 (1981)(court can order disclosure of materials outside scope of discovery statutes "in the furtherance of justice"). No constitutional grounds for discovery were asserted in *McKendall.*

The prosecution's statutory duty to disclose has been interpreted by the Oregon courts as a duty to preserve. *E.g., State v. Johnson*, 26 Or App 651 (1976)(police officer's field notes were paraphrased in a formal report, then destroyed; court holds duty to preserve applies pre-indictment, because the statutory duty to disclose would otherwise be easily circumvented).

The courts have also held that "material and information within the possession or control of the district attorney," ORS 135.815, includes material and information to which police

agencies have access. *E.g., State v. Warren*, 304 Or 428, 433 91987)(court reasons that police have access to CSD files, so prosecution is deemed to have possession of CSD files since prosecution is deemed to have possession of materials within possession or control of police); *State v. Clements,* 52 Or App 309, 315 (1981)(information in the possession of private security personnel may be deemed in possession of DA upon proper showing that they function like a police agency).

ORS 135.815(1) provides, in pertinent part:

> [T]he district attorney shall disclose to the defendant the following material and information within the possession or control of the district attorney:
>
> (1) The names and addresses of persons whom the district attorney intends to call as witnesses at any stage of the trial, together with their relevant written or recorded statements or memoranda of any oral statements of such persons.

The State must furnish both the name and address of its potential witnesses, if it is able to find the witness' address by exercising diligence. *See State v. Clarke*, 106 OrApp 204 (1991). The State is also required to furnish the defense with any changes of address of its potential witnesses. See ORS 135.845(2)(continuing duty to disclose).

It is well-settled that hand-written notes are within the scope of statutory discovery as memoranda of "witness statements." Thus any notes of any State agent, including the prosecutor, concerning statements by any person who the prosecution intends to call at trial, as well as any notes of the investigating officers detailing their activities, are discoverable. *See, e.g., State v. Gallup*, 108 Or App 508 (DA must disclose notes of witness statements in his files); *cf., State v. Armstrong,* 71 Or App 467 (1984)(officer's notes are not "statements" *when they are fully incorporated in formal reports*)(emphasis supplied). Furthermore, Oregon State Police officer notes are considered “official agency records,” and are subject to disclosure under the state’s public records act when the formal police reports are subject to disclosure.

The statutory requirement for disclosure of witness statements extends to those of persons who are reasonably anticipated to be called as impeachment or rebuttal witnesses. *State v. Burdge*, 295 Or 1 (1983); *State v. Young*, 94 Or App 683 (1989)(rejecting counsel's argument that he didn't "intend" to offer statement until witness testified contrary to the statement). Additionally, because statutory discovery does not distinguish experts from any other type of witness, *State v. Caulder*, 75 Or App 457, *rev. den.,* 300 Or 451 (1985), the notes of expert witnesses should also be discoverable under ORS 135.815(1).

Statutory discovery of a defendant's statements applies to all memorialized statements, regardless of whether the State intends to offer the statements at trial. ORS 135.815(2). The same unrestricted discovery of a co-defendant's statements is statutorily required "if the trial is to be a joint one," *id.*

All tangible items and objects "which were obtained from or belong to the defendant," ORS 135.815(4)(b), must be disclosed, regardless of whether the State intends to offer the items at trial. All other physical evidence which the State intends to offer at trial must likewise be disclosed, ORS 135.815(4)(a). This requirement applies to anticipated impeachment evidence. *State v. Dickerson, supra; State v. Young*, 94 Or App 683 (1989)(defense must disclose tape and transcript of recorded conversation between victim and defense witness which it intended to use for impeachment, since defense could anticipate that the statements could be used for that purpose; court rejects defense counsel's argument that he didn't "intend" to offer tape until victim testified contrary to recorded statement).

ORS 135.815(5) requires the State to disclose "any record of prior criminal convictions" of its potential witnesses which are known to the State based on "a good faith effort to determine if such convictions have occurred." The defense submits that "convictions" include juvenile convictions, as such are part of an offenders criminal history under our Sentencing Guidelines. ORS 135.815(5) also is not restricted to convictions admissible to impeach a witness' character for truthfulness.

ORS 135.825 requires the State to disclose (1) the occurrence of a search or seizure; and (2) any relevant material or information obtained thereby, the circumstances of the search or seizure, and the circumstances of the acquisition of any specified statements from the defendant, upon written request by the defense. This provision is, likewise, not restricted to matters which the State intends to use at trial.

II. CONSTITUTIONAL DISCOVERY RIGHTS

Under the Due Process Clause of the 14th Amendment of the United States Constitution, the State must disclose to the defense upon request all information which is favorable to the defense and material to guilt or punishment. *E.g., Brady v. Maryland*, 373 US 85 (1963). This materiality standard is normally not a heavy burden. Evidence is material as long as there is a strong indication that it will "play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal." *US v. Lloyd*, 992 F2d 348, 351 (D.C. Cir. 1993)(citations omitted).

The Oregon Court of Appeals long ago determined that *Brady* material is not limited to written material and is not limited to statements or witnesses the State intends to call. *State v. Fleischman,* 10 Or App 22, 32 (1972). The Court more recently reaffirmed this rule in *State v. Fortune*, 112 Or App 247, *rev. den.,* 313 Or 627 (1992). In *Fortune,* during trial in a child rape case, the victim told her mother at a recess that two other men had also molested her. Multiple molestations "were potentially inconsistent with the medical evidence." The prosecutor knew this, but did not disclose the new statement to the defense because he thought it was irrelevant and inadmissible because of the rape shield law. The Court of Appeals affirmed the grant of a new trial, because the unrecorded statement was exculpatory and should have been disclosed.

The Court of Appeals has also held that the State must afford the defense access to information or evidence in its possession which could be used to challenge the credibility of a key piece of the prosecution's evidence, under the *Brady* doctrine. *State v. Michener*, 25 Or App 523 (1976)(defense entitled to retest breath test ampules in DUII prosecution).

Oregon's Constitution does not contain an explicit guarantee of "due process," and the Oregon Supreme Court has yet to consider discovery questions under our Constitution, relying instead on federal law. See *State v. Warren*, 304 Or 428, 431 (1987). However, the objective of the federal rules requiring the State to collect, preserve and disclose potentially exculpatory evidence is the avoidance of an unfair trial to the accused. Article 1, Sections 10, 11, 20 and 22 of the Oregon Constitution contain explicit guarantees which promote this same objective of a fair trial and fair dealings between the government and the individual accused.

Article I, Section 11 of the Oregon Constitution provides that "In all criminal prosecutions, the accused shall have the right . . . to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor. . . ."

The Oregon Courts, by allowing the State's discovery to supplement the pleadings in terms of giving due notice of the charges to the defense, *see, e.g., State v. Kincaid*, 78 Or App 23 (1986), have linked the State's discovery obligations to the constitutional right to be informed of the particulars of the offense, insofar as the State possesses that information. *See also State v. Cooper*, 78 Or App 237, 239-40 (1986)(The 14th Amendment of the United States Constitution requires that the charging instrument describe an offense with sufficient precision and certainty to enable a presumptively innocent person to prepare for trial).

Brady requires that the prosecution disclose exculpatory evidence which is material to guilt or punishment, upon request by the defense. *US v. Agurs*, 427 US 97 (1976) defined "material" in different ways for different situations:

(1) perjured testimony is always material;

(2) if a specific request is made, and "if the 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 . . . <u>when the prosecutor receives a specific and relevant request, the failure to make any response is seldom if ever excusable.</u>" 427 US 97, 106 (emphasis supplied); and

(3) if a generalized *Brady* request or no request at all is made, materiality is not mere helpfulness; rather, "the omitted evidence must create a reasonable doubt that did not otherwise exist," to constitute constitutional error. 427 US at 112-113.

In *US v. Bagley*, 473 US 667 (1985), the Court rejected these distinctions between "no request," "general request," and "specific request," for purposes of appellate review. Rather, the appellate inquiry should be whether "the prosecutor's response to [defendant's] discovery motion misleadingly induced defense counsel to believe . . . the evidence did not exist, possibly causing counsel to abandon independent investigation, defenses, or trial strategies," 473 US at 683.

Bagley held that impeachment evidence is "exculpatory evidence" for purposes of *Brady*. Impeachment evidence includes prior inconsistent statements, criminal history, deals, motives and bias, etc. Categories of evidence generally considered to be *Brady* material include a witness' prior record, *U.S. v. Strifler*, 851 F2d 1197 (9th Cir. 1988); witness statements favorable to the defendant, *Jackson v. Wainwright*, 390 F2d 288 (5th Cir. 1968); the existence of witnesses favorable to the defense, *US v. Wilkins*, 326 F2d 135 (2d Cir. 1964); specific evidence which detracts from the credibility or probative value of testimony or evidence used by the prosecution, *Thomas v. US*, 343 F2d 49 (9th Cir. 1965); and prior contrary statements of a prosecution witness, *Giles v. Maryland*, 386 US 66 (1967).

The Oregon courts have recognized the following matters to be proper areas of inquiry for impeachment, and, thus, if the State has information concerning any of these matters, that information must be disclosed:

1. Prior bad acts by witness which tend to show bias, interest or motive to testify in way favorable to prosecution. *State v. Brown*, 299 Or 143 (1985)(witness on probation, and had prior fights and quarrels with defendant); *State v. Rodriquez*, 115 OrApp 281 (1992)(witness had been arrested, may harbor a hope for leniency); *State v. Sheeler*, 15 OrApp 96 (1973)(witness involved in incident which could result in criminal charges, may harbor hope for leniency even though not arrested); *State v. Davidson*, 252 Or 617 (1969)(witness claimed to

feel "heat" from police); *State v. Gardner*, 67 Or App 404 (1984)(uncharged crimes by witness if relevant to relationship to defendant or other witnesses).

2. Police practices which may violate written policies. *See, State v. Hubbard*, 297 Or 789 (1984)(right to vigorous cross-exam of police officer regarding knowledge of procedures for handling suspects and potential sanctions for violating procedures, to tend to show officer had interest in testifying falsely that he followed procedures).

The Oregon and federal courts have consistently held that impeachment evidence subject to *Brady* includes juvenile records showing pending charges, probationary status, and any other matters reflecting motive, bias or interest of the witness. *Davis v. Alaska*, 94 Sct 1105 (1974); *Burr v. Sullivan*, 618 F2d 583 (9th Cir. 1980); *State v. Nice*, 240 Or 343 (1965).

The one of the latest Supreme Court decision's in the *Brady* line of cases is *Kyles v. Whitley*, 115 SCt 1555 (1995). The case is significant in several respects. First, it holds that reviewing courts will determine reversible error by evaluating the cumulative effect of all undisclosed evidence favorable to the defense, rather than making a separate assessment of the "materiality" of each undisclosed piece of evidence. Second, it requires prosecutors to take responsibility for learning of all undisclosed evidence in the possession of the police.

> In the State's favor it may be said that no one doubts that police investigators sometimes fail to inform a prosecutor of all they know. But neither is there any serious doubt that 'procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it.' *Kyles, supra,* 115 SCt at 1568 (citation omitted).

Third, it recognizes that evidence or information which would give the defense opportunities to attack the thoroughness or good faith of the police investigation or the decision to prosecute the defendant are *Brady* material.

The lower federal courts and our sister courts have found *Brady* violations from nondisclosure of the following types of evidence or information:

1. Any deals or consideration given to the witness, or other motive to cooperate. *E.g., US v. Foster*, 874 F2d 491 (9th Cir. 1988); *Brown v. Wainwright*, 785 F2d 1457 (11th Cir.

1986)(concerning witness's tentative plea agreement); *People v. Cwilka*, 386 NE 2d 1070 (N.Y. 1979)(correspondence between DA and parole board); *US v. LucLevasseur*, 826 F2d 158 (1st Cir. 1987)(trial court may order pretrial disclosure of all promises, rewards and inducements made to any witness the government intended to call); *Bagley v. Lumpkin*, 798 F2d 1297 (9th Cir. 1986)(financial inducements); *People v. Ruthford*, 14 Cal. 3d 399, 121 Cal. Rptr 261 (1975)(benefit given to witness' wife by prosecution); *Moynahan v. Manson*, 419 FSupp 1139 (D. Conn. 1976)(witness was target of police investigation and threatened with prosecution); *Reuter v. Solem*, 888 F2d 578 (8th Cir. 1989)(DA was member of parole board and knew that witness was scheduled for a commutation hearing after the close of the trial); *Ex Parte Turner*, 545 SW 2d 470 (Tex. Crim. App. 1977)(police officer aided witness in getting released from jail).

2. Inconsistent statements. *Mills v. Scully*, 653 F.Supp. 885 (SDNY 1987)(witness testified at grand jury contrary to testimony at trial); *Ex Parte Adams*, 768 SW 2d 281 (Tex Crim App 1989)(en banc)(trial testimony about positive ID of defendant at line-up different from statements to police at time of line-up); *McDowell v. Dixon*, 858 F2d 945 (4th Cir. 1988)(prior inconsistent descriptions of suspect).

3. Witnesses the prosecution does not intend to call: *United States v. Cadet*, 727 F2d 1453(9th Cir. 1984)(names and addresses of eye witnesses to crime must be disclosed to the defense even though--and perhaps because--the government does not intend to call them at trial; court notes it is appropriate to conclude from the fact that the government did not intend to call a witness to the crime that there was a reasonable possibility that such person would provide evidence favorable to the defense); *United States v. Sheehan*, 442 F.Supp. 1003 (D. Mass 1977)(eyewitness to bank robbery not called by prosecution because of hesitancy in his identification of defendant); *People v. Johnson*, 38 Cal. App. 3d 228, 113 Cal. Rptr 303 (1974)(identities of experts contacted by prosecution who developed opinions which would corroborate the defense theory of the case).

4. Scientific tests or reports the prosecution does not intend to use. *Carter v. Rafferty,* 826 F2d 1299 (3rd Cir. 1987)(lie detector reports); *US ex rel. Smith v. Fairman*, 769 F2d 386 (__ Cir. 1985)(ballistic report); *Pennington v. Commonwealth*, 577 SW 2d 19 (Ky.Ct. App. 1984)(blood alcohol test); *O'Rearden v. State*, 777 SW2d 455 (Tex. Ct. App. 1989)(sex abuse examination report).

5. Information about co-defendants. *Jones v. Jago*, 575 F2d 1164 (6th Cir. 1978)(statements of co-defendant eyewitness who became State's witness at trial); *Troedel v. Wainwright*, 667 FSupp 1456 (S.D. Fla. 1986)(State failed to disclose instances of co-defendant's propensity for violence despite State's knowledge that defendant's theory was that it was the co-defendant who had motive, intent and violent nature).

6. Criminal records *Moore v. Kemp*, 824 F2d 847 (11th Cir. 1989)(prosecution's failure to disclose criminal record of key witness requires reversal).

7. Partial tape recording. *United States v. Latham*, 874 F2d 852 (1st Cir. 1989)(court held that tape of undercover drug buy, even though incomplete due to malfunction of equipment, must be turned over the the defense because it may be used to impeach or invalidate officer's testimony); *cf.,* officers' field notes.

8. Probation file, mental health and medical records**.** *United States v. Strifler*, 851 F2d 1197 (9th Cir. 1988)(court announced it would reverse a conviction for a *Brady* violation where the trial court fails to release information from a witness' probation file if it is found that the information is probative, relevant and material); *Eldred v. Commonwealth*, 906 SW2d 694 (1995)(defense entitled to witnesses' mental health and medical records upon articulable basis for a reasonable inquiry into these areas; court should subpoena the records if State does not have access to them).

9. Defendant's statements**.** *United States v. Severdija*, 790 F2d 1556 (11th Cir. 1986)(government's failure to disclose prior consistent statements of an exculpatory nature by defendant during interview by officers required reversal).

III. SUPPLEMENTAL ARGUMENTS FOR DISCLOSURE OF PARTICULAR ITEMS

A. NOTES OF "STATE AGENTS"

Assuming that notes by law enforcement agents, SCF, or C.A.R.E.S. Northwest staff, exist or existed, at least a portion of those notes should be subject to statutory disclosure. *State v. Divito,* 152 Or.App. 672, 683 (1998)(*en banc*), *aff'd on other grounds*, 330 Or 319 (2000)("[A]n officer's notes become 'relevant statements' within the meaning of [ORS 135.815(1) (1997)] when they can be used for purposes of impeachment. In order for notes to be used for purposes of impeachment, they must be relevant to some witness' testimony."); *State v. Fritz,* 72 Or App 409, 413 (1985)(officer's notes of conversation with defendant discoverable, even though officer prepared a report from notes which was disclosed)(cited with approval in *State v. Warren*, 81 Or App 463); *State v. Johnson*, 26 OrApp 651 (1976)(discovery violation when officer destroyed handwritten report done 15 minutes after his participation in drug buy with defendant; formal report was prepared by another officer from the handwritten report, but other information was added); *cf., State v. Armstrong*, 71 OrApp 467, 469 (1984)(not a discovery violation when officer had destroyed notes after making sure that *all* information in the notes was included in his report).

Additional support for disclosure of "notes," regardless of the medium chosen for memorializing the information, is found in ORS 135.815(2)(requiring disclosure of witness "written or recorded statements or memoranda of any oral statements")(emphasis supplied). *See, e.g., State v. Johns,* 44 Or App 421, 426 (1980)(holding CSD caseworker notes discoverable); *State v. Warren,* 304 Or 428, 431-2 (1987)(CSD caseworker's notes during interview of witness discoverable); *State v. Gallup,* (108 OrApp 508 (1991)(DA must disclose his notes of witness statements).

Materials not subject to statutory discovery may well be discoverable as exculpatory evidence. *See, Kyles v. Whitley,* 115 SCt 1555, 1572 (1995)(finding *Brady* violation based on failure to disclose information collected by the police which "carried within it the potential for discrediting the police methods employed in assembling the case"); *see generally United States v. Harrison,* 524 F2d 421, 429 (D.C. Cir. 1975)(court discusses reasons for requiring disclosure of police field notes, e.g., police make mistakes, may be biased, may distort facts

when preparing formal reports). It is impossible to determine whether given notebook entries are discoverable without first determining what is contained in those notebook entries.

The notebook entries of police officers and District Attorney staff may be used for the purposes of cross-examination. OEC 612 and 613.

Defendant hereby asserts a right to disclosure of these items pursuant to his rights of confrontation and of due process notice under Article 1, Section 11 of the Oregon Constitution and the Sixth, Eighth and Fourteenth Amendments of the United States Constitution.

Information from these sources which has not been included in the officers' formal reports may raise a reasonable doubt concerning the State's evidence against the Defendant. *See, e.g., Kyles, supra,* 115 SCt at 1572 ("A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible *Brady* violation")(citation omitted). Defendant hereby asserts a right to disclosure of all notebook entries pursuant to his Fourteenth Amendment Due Process rights to present this type of defense at trial.

B. DEFENDANT'S UNRECORDED STATEMENTS

The State plainly has the obligation to disclose to the defense "[A]ny written or recorded statements or memoranda of any oral statements made by the defendant . . . " ORS 135.815(2). Disclosure is not limited to those statements which the State intends to offer in evidence. *Id.*

This discovery statute mandates disclosure of "field notes" of a defendant's statements jotted down by individuals affiliated with the prosecution, even if the notes have allegedly been incorporated in a formal report which has been disclosed. *State v. Fritz,* 72 Or App 409 (1985)(officer's notes of conversations with defendant are discoverable, even though officer prepared a report from notes which was disclosed); *see, State v. Wood*, 112 OrApp 61, 67 (1992)(CSD file contained medical report by doctor who examined victim; State did not intend to call doctor, but was required to disclose those portions of the doctor's report which contained memoranda of oral statements by victim); *see also State v. Warren,* 304 Or 428,

433 (1987)(if police have access to information in possession of third-parties, the prosecution is deemed to have possession of the information for discovery purposes).

The defense seeks disclosure of statements of the accused regardless of whether they are written or recorded in any medium, if the State intends to offer those statements at any stage of the proceedings; in other words, we seek disclosure of unrecorded statements of Defendant. The authority for this request lies in ORS 135.825, which provides:

> Except as otherwise provided in ORS 135.855 and 135.873, the district attorney shall disclose to the defendant:
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> * * * * * *
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> (2) Upon written request by the defendant, . . . the circumstances of the acquisition of any specified statements from the defendant.

The Commentary to the Proposed Oregon Criminal Procedure Code, Section 323 (upon which ORS 135.825 was based--they are identical) states:

> The purpose of the section is to require disclosure of information which may be the basis for a motion to suppress evidence based on alleged violations of the Fourth or Fifth Amendment.
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> * * * * * *
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> Expanded pretrial discovery on Fourth and Fifth Amendment questions may serve to maximize the opportunity of the state trial court to rule on constitutional challenges in a timely and orderly manner.

The question of whether unrecorded statements must be disclosed to the defense has not been decided by the appellate courts of this state.

> [W]e need not here decide that it was not the intent of Oregon's discovery statute that unrecorded statements would be subject to discovery. *State v. Curtis,* 20 Or App 35, 39 (1975).

However, the Commentary to the ABA standard upon which ORS 135.815(2) was based provides some guidance on this point:

> The basis for providing an accused a copy of this own statements has usually been the notion of fundamental fairness, coupled with the absence of any compelling reason to withhold

> disclosure, at least in the case of a statement which is to be introduced during the prosecution's case. As Chief Justice Weintraub of New Jersey has observed:
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> 'No one would deny a defendant's right thoroughly to investigate the facts of the crime to prepare for trial of that event. When a confession is given and issues surrounding it tend to displace the criminal event as the focus of the trial, there should be like opportunity to get at the facts of the substituted issue. Simple justice requires that a defendant be permitted to prepare to meet what thus looms as the critical element of the case against him."
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> *State v. Johnson,* 28 N.J. 133, 137, 145 A.2d 313, 316 (1958).
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> * * * * * *
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> The requirement of the Miranda warnings and the right of the defendant to move for suppression provide further reasons for disclosure of all statements by the accused, whether or not it is intended to use them in evidence. There will be few instances when the substance of the statement will not shed light on whether the accused was in custody when the statement was made, whether the warnings were properly given and whether the defendant made the kind of waiver essential to use of the statement. Since it is desirable that these issues be determined in advance of trial or plea of guilty, the appropriate time for disclosure is not only prior to those events but also prior to the defendant's motion for suppression.
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> Commentary, ABA Standards Relating to Discovery And Procedure Before Trial, Standard 2.1(a)(ii), pp58-59 (emphasis supplied).

Both the Commentary to the Proposed Oregon Criminal Code and the Commentary to the ABA Standards Relating To Discovery And Procedure Before Trial, upon which ORS 135.815(2) was based, support the proposition that the State should be ordered to disclose to the defense recorded and unrecorded statements of Defendant.

This Court must rule on the admissibility of alleged admissions or statements of the accused prior to trial. *See State v. Brewton, supra.; see also State v. Ely,* 237 Or 329, 332 (1964)(defendant's non-custodial statements to "private" parties subject to suppression under some circumstances).

If the Court is faced with ruling prior to trial on the admissibility of recorded statements of the accused and during trial on the admissibility of unrecorded statements of the accused, the potential for a mistrial is great. If the defense is ignorant of the unrecorded statements of the accused the potential for them being blurted out by a witness in front of a jury is great. The available time to research the issues presented is diminished if such a ruling must be made during trial, thereby impinging upon the accused's right to effective assistance of counsel. Then the Court will have been deprived of fulfilling its obligation to rule on the admissibility of the statements *in camera* as required by *State v. Brewton, supra*.

C. AMENDMENTS TO WITNESS STATEMENTS

The defendant seeks disclosure of amendments or changes made by state's witnesses of their prior statements whether recorded or not. In other words, we seek disclosure of "surprise testimony" and prior inconsistent statements. The grounds for this motion are statutory (ORS 135.805, 135.873) and constitutional (Oregon Constitution, Article I, Sections 10, 11 and 20) (United States Constitution, Amendments V, VI, VIII and XIV).

Indeed, since prior inconsistent statements are the classic form of impeaching information, disclosure of this information should be ordered because impeaching information must be disclosed under the principles of *Brady v. Maryland*, 373 US 83, 83 S Ct 1194(1963). *United States v. Bagley,* 473 US 667, 105 S Ct 3375(1985) (Impeaching as well as exculpatory evidence is favorable to the accused under *Brady*).

Additionally, it must be remembered that statements made to a prosecuting attorney are not covered by the "work product" exception. *See*, *Goldberg v. United States,* 425 US 94, 96 S Ct 1338(1976); *State v. Gallup,* 108 OrApp 508 (1991). Furthermore, the *Brady* doctrine requires disclosure of "prior inconsistent statements" whether or not they have been reduced to writing or otherwise recorded. The Oregon Court of Appeals long ago determined that *Brady* material is not limited to written material and is not limited to statements or witnesses the State intends to call. *State v. Fleischman,* 10 Or App 22, 32 (1972).

In *Hudson v. Blackburn*, 601 F2d 785 (5th Cir 1979) the state's key witness (Wilson) testified that he had identified the defendant in a lineup held five days before trial. The state knew that Officer DeSala was present at that lineup and that according to DeSala the star witness did not make the identification at that time. The state failed to disclose this information to the defense. The Court stated:

> The conflict in testimony regarding the lineup ha[d] a direct bearing on Wilson's credibility and was, therefore, material evidence. Thus, we believe that the prosecution was under an affirmative duty to disclose the controversy surrounding the pretrial identification. 601 F2d at 789.

The defense called DeSala and heard his testimony that contradicted that of Wilson. Because no prejudice was found, the conviction was affirmed. Nevertheless, the state was obligated to disclose the conflict in the testimony. See also *Kyles v. Whitley,* 115 SCt 1555, 1569-1571(1955)(finding *Brady* violation when police failed to provide statements by eyewitnesses taken at the scene, which were inconsistent with later statements of these witnesses).

The defense is entitled to any changes in witnesses' statements made while conversing with the police or any other state agent, including prosecutors, regardless of whether those changes have been memorialized in notes or reports.

In *United States v. Tamura*, 694 F2d 591 (9th Cir 1982), Ellis, a former co-defendant turned government witness, re-read his pretrial statement a month before trial and told the prosecutor that, contrary to his statement, he first negotiated with the defendant, and not Akimoto. Defense counsel first heard of the change during the prosecutor's opening statement. The Court stated:

> We agree with Tamura that the Government unfairly surprised him. *** The new testimony that Tamura was involved from the outset called for a new defense strategy and may have required new witnesses. 694 F2d at 599.

The Court ruled that the trial court did not err by denying motions to dismiss the indictment, a mistrial, or a continuance. Because the trial court gave defense counsel the option of excluding the testimony or allowing the testimony with a cautionary instruction (the actual remedy employed), the Court ruled that the trial judge did not abuse his discretion in denying the motions. Nevertheless, the fact remained that the "Government unfairly surprised" the defendant by not disclosing Ellis' unwritten change in his pretrial statement.

In *Kyles v. Whitley, supra,* the U.S. Supreme Court found the State violated *Brady* when it withheld from the defense numerous inconsistent statements by an informant-witness whom neither side called to testify, although the informant was implicated as the perpetrator of the crime. The withheld statements were in the form of electronic recordings, numerous police interviews, and notes by the chief prosecutor. The Court noted the witness' "various statements would have raised opportunites to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation, as well." 115 SCt at 1571.

The Defendant's request here encompasses changes made in the prosecutor's handwriting as well as any other changes or amendments, whether or not recorded at this time in some medium. The Court should order disclosure now so that there is no "surprise testimony" in this case, and so that the defense is able to fully cross-examine and impeach the State's witnesses.

D. CRIMINAL HISTORIES

The defense seeks disclosure of criminal histories, including arrests and convictions outside the scope of OEC 609 or which have occurred in other jurisdictions, of all witnesses identified in the discovery. ORS 135.815(5)(requiring State to disclose criminal convictions of its potential witnesses) and ORS 135.845(duty to disclose as soon as practicable following the filing of an indictment).

In *State v. Ireland*, 11 Or App 264 (1972), the defense moved the court for an order requiring the State to provide a list of criminal convictions of state witnesses. The State

announced that it did not have FBI rap sheets on the witnesses, but that it did have a teletype indicating that one of its witnesses did have convictions. The court in effect denied the defendant's motion, stating that it was not going to require the prosecution to check with the FBI to see if witnesses have convictions. At trial, the defense moved the court for a continuance to investigate the prior record of a State's witness. The court denied the motion for continuance. The Court of Appeals reversed the defendant's conviction and stated: “In effect, FBI "rap sheets" are in the "constructive" possession of the state in almost every case.” 11 Or App at 268.

See also, *State v. Williams*, 11 Or App 255, 500 P2d 722 (1972) (conviction reversed for failure of prosecutor to disclose rap sheet which would have shown arrests for intoxication which would have supported the defendant's theory of the case); *United States v. Griggs*, 713 F2d 672, 673 (11th Cir 1983) ("'tip of the iceberg'" of other undisclosed evidence); *Martinez v. Wainwright,* 621 F2d 184, 188 (5th Cir 1980) ("If the rap sheet were held to be hearsay and not admissible to prove the other convictions, it at least would have provided the defense the ability to contact the appropriate penal facilities to acquire an official record which would have been admissible.")

E. GRAND JURY TESTIMONY AND NOTES

The Oregon courts have long recognized in dicta that pre-trial disclosure of grand jury testimony may be constitutionally compelled in appropriate circumstances. *State ex rel Johnson v. Roth*, 276 Or 883, 887 n.5 (1976); *State v. Hartfield,* 45 Or App 639, 647 (1980), *rev. and remanded*, 290 Or 583, 597 n.1 (1981)(Tanzer, J., dissenting); *State v. Wood*, 67 Or App 218, 224-27 (1984) (finding that defendant had met the *Brady* test by pointing out discrepancies between pre-trial statements and grand jury testimony, and because the guilt or innocence of the defendant turned on the witnesses' testimony). See *Brady v. Maryland*, 373 US 82 (1963)..

If there is a difference of opinion as to whether the evidence is exculpatory or material to guilt or innocence, the dispute should be resolved by the trial court after an *in camera* inspection. See *State v. Wood, supra,* at 227 n.4, and cases cited therein.

The Oregon Supreme Court has already held that a witness' grand jury testimony must be provided to a defendant once the witness has testified at trial on direct examination for the state. *State v. Hartfield*, 290 Or 583 (1981). The Court found that "[w]here a witness before the grand jury has testified at trial for the state, a particularized need for disclosure exists for purposes of testing the witness's credibility. [citation omitted] As such, the furtherance of justice requires disclosure of prior recorded statements." 290 Or at 592. Defendant is simply seeking pre-trial disclosure of the same type of evidence.

The *Hartfield* court made clear that it was not concerned with the issue of pre-trial disclosure, nor did its holding involve the constitutional obligations of disclosure. 290 Or at 589. These issues were, however, addressed by Justice Tanzer:

> Due process requires that the prosecution provide to the defendant any exculpatory material. Brady v. Maryland, 373 US 83 (1963). The constitutional rule may require disclosure of exculpatory grand jury testimony, State ex rel Johnson v. Roth, 276 Or 883, 887 note 5 (1976), and it must be provided at a time when the exculpatory material is useable by the defense, State ex rel Dooley v. Connall, 257 Or 94, 102 (1970).

290 Or at 597 n.1 (Tanzer, J., dissenting).

The Utah Supreme Court in *State v. Faux*, 9 Ut 2d 350, 345 P2d 186 (1959), specifically addressed the issue of disclosure of grand jury testimony to a defendant before the commencement of trial. The court held that the defendant was entitled to a pre-trial examination of grand jury testimony in order to impeach the witnesses at trial. Faux was charged with misconduct in office, with the prosecution's proof resting almost entirely on the testimony of witnesses concerning statements by the defendant. Thus any effort to impeach a prosecution witness and refute the charge would depend greatly on the defendant's precise knowledge of prior testimony by the witness. See also ORS 132.220 (court may require grand jury member to disclose the testimony of a grand jury witness, for the purpose of ascertaining whether it is consistent with that given by the witness before the court).

F. PRETRIAL DEFENSE SUBPOENAS DUCES TECUM

Effective November 4, 1993, the Legislature added the following provision to ORS 136.580:

> (2)Upon the motion of the state or the defendant, the court may direct that the books, papers or documents described in the subpoena be produced before the court prior to the trial or prior to the time when the books, papers or documents are to be offered in evidence and may, upon production, permit the books, papers or documents to be inspected and copied by the state or the defendant and the state's or the defendant's attorneys.

This statute is modeled after Rule 17(c) of the Federal Rules of Criminal Procedure, which provides, in relevant part:

> (c)**For Production of Documentary Evidence and of Objects.** . . . .The court may direct that books, papers, documents or other objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

The Court of Appeals, in *State v. Cartwright*, 173 Or App 59, 67-69 (2001), *reversed on other grounds*, 336 Or 408 (2004), held that this statute should be interpreted the same as the federal courts have interpreted Rule 17(c). The Oregon Supreme Court in *Cartwright*, 336 Or 408 at 414-415, explained that the statute was designed to allow production of evidentiary materials in advance of the hearing at which a party intended to offer the evidence. Furthermore, the defense has no right to issue such subpoenas without the Court's permission, and early production is left to the Court's discretion. *Id. Cartwright* holds that the defense is entitled to subpoena for trial documentary materials in the possession of third parties, even over a claim of privilege, see 336 Or at 418-419; it therefore suggests that a Court could order the same production in advance of trial under this statute, provided the defense could show the privilege would be defeated once the witness claiming the privilege testified at trial.

Cartwright calls into question the continuing viability of *State v. Bassine*, 188 Or App 228 (2003), which held the defense was not entitled to pretrial production of psychotherapist records of the alleged victim in a child sex abuse prosecution. The defense in *Bassine* did not argue that any exception to the psychotherapist-patient privilege applied. ORS 419B.040, however, establishes an exception to the psychotherapist-patient privilege in child sex abuse cases for both exculpatory and inculpatory material. *State v. Hansen,* 304 Or. 169 (1987); *State v. Reed,* 173 Or.App. 185, 200 (2001).

The scope of a federal Rule 17(c) subpoena duces tecum is historically broad, encompassing materials not otherwise discoverable from the government pursuant to the federal discovery Rule 16. It provides the defense with an opportunity to obtain evidentiary material by subpoena. The material subpoenaed need not actually be used in evidence, but the court may issue a subpoena upon a party's good faith effort to obtain evidence. *Bowman Dairy Co. v. United States,* 341 US 214, 219-220 (1951); *Cf., Cartwright,* 336 Or at 415 (Oregon's statute "provides a specific mechanism for obtaining access to the subpoenaed

material *before* the court proceeding at which the material will *or may be admitted* as evidence.")(emphasis supplied).

> [R]ule 17's chief innovation was to expedite the trial by providing a time and place before trial for the inspection of the subpoenaed materials. However, the plain words of the Rule are not to be ignored. They must be given their ordinary meaning to carry out the purpose of establishing a more liberal policy for the production, inspection and use of materials at the trial.
>
> *Bowman Dairy Co. v. United States,* 341 US at 220-21.

Subpoenas under Rule 17(c) may be served upon third parties in possession of documents relevant to the defense. *United States v. Nixon*, 418 US 683, 702 (1974). The federal courts have required the movant to demonstrate a sufficient likelihood that the materials will be relevant and admissible to an issue before the court, and that the subpoena be specific enough so that the person subpoenaed or other party having standing can lodge any objections to relevancy or admissibility. *Id.* at 700. The showing of relevancy required by the movant is to state facts which permit a rational inference that at least part of the items sought relate to the offenses charged. 418 US at 700.

In *US v. Gross*, 24 FRD 138, 141 (S.D.N.Y. 1959), the court explained: "What is allowed to the parties under Rule 17(c) is to obtain documents which are admissible in the sense that they are competent. Their relevance or irrelevance can be ascertained by the inspection after production."

Although a defendant may not be completely aware of the contents of subpoenaed documents, that does not preclude issuance of a Rule 17(c) subpoena. The courts have shown considerable sensitivity to the fact that litigating parties are rarely in a position to specify in exact detail the contents of a particular document. Upholding a government issued Rule 17(c) subpoena, the appellate court in *United States v. MacKey,* 647 F2d 898, 901 (9th Cir. 1981), stated:

> The indictment charges MacKey with conspiring to rig prices and bids on construction projects. The diary and calendar were sought to establish that he did indeed meet with competitors

> and engage in discussions that the Sherman Act prohibits. Because the government has not yet seen the documents, it would be unreasonable to expect a more detailed connection be provided between the contents of the documents and the ultimate facts at issue in the case.

At a minimum, a Rule 17(c) subpoena properly commands production of materials where the total circumstances permit a rational inference that at least a portion of the materials relate to the charged offenses. *Nixon, supra*, 418 US at 700.

Turning to ORS 136.580(2), it is clear the statute operates independently of the Oregon Discovery statutes, ORS 135.805-135.873. Thus, the mere fact that the defense may be unable to show it is entitled to the materials under the discovery statutes or the constitutional rules for the discovery of evidence material to guilt or punishment, does not prevent the defense from seeking a subpoena duces tecum in advance of trial. Indeed, the primary use of ORS 136.580(2) is to obtain materials outside the scope of statutory or constitutional discovery rights, because the materials are in the possession of third-parties rather than in the State's possession.

If a defendant could use the compulsory process guaranteed him under the state and federal constitutions to inspect the materials at trial, there is little sense in reading ORS 136.580(2) to be more restrictive simply because it allows inspection in advance of trial to promote judicial efficiency. See Article 1, Section 11, Oregon Constitution and Amendments Six and Fourteen, United States Constitution; see also, *Dennis v. US*, 384 US 855, 873 (1966)("it is especially important that the defense, the judge and the jury should have the assurance that the doors that may lead to truth have been unlocked. In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact.").

G. REVIEW OF STATE AGENTS/WITNESSES PERSONNEL FILES

Brady requires the State to disclose any impeachment material that may be contained in the personnel files of the law enforcement officers it intends to call at trial. *See, United States v. Jennings*, 960 F2d 1488, 1490 (9th Cir. 1992); *see also*, *State ex rel Wilson v.*

Thomas, 74 Or App 137 (1985)(internal affairs took statement from witness officer, which defendant sought to inspect; held to be a "statement" within prosecutor's control). The Ninth Circuit has interpreted *Brady* in this situation to be triggered by a request by the defense for the prosecutor to inspect the files, without any showing by the defense that the files will likely contain impeachment materials. *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 1588 (1992); *United States v. Jennings, supra.*

The defense contends that Due Process requires disclosure of any impeachment material that may be contained in the personnel files of any state agents the State intends to call at trial, including SCF or CARES staff, there being no reasoned distinction between law enforcement agents and other investigatory agents of the State. *See also, State v. Clements,* 52 Or App 309, 315 (1981)(information in the possession of private security personnel may be deemed in possession of DA upon proper showing that they function like a police agency).

Terri Wood, OSB #88332
ATTORNEY FOR DEFENDANT