Criminal Discovery and Psychological Defenses in West Virginia: Squeezing a Lemon or Kicking a Dog

J. Robert Russell
West Virginia University College of Law

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I. INTRODUCTION

Ten years ago, Justice Brotherton, writing for a majority of the Supreme Court of Appeals of West Virginia, noted that:

Punishing a person who doesn’t understand what he is doing or can’t control his actions would take us back to the time when the mentally ill were randomly incarcerated or tortured with demonic witch cures. It would be a cruel and senseless act, comparable with
kicking a dog for disobeying a written command.\(^1\)

The classic example of such a person is the husband who strangles his wife, all the time suffering from the delusion that he is squeezing a lemon. This situation was laid out some forty years ago by the drafters of the Model Penal Code to justify the inclusion of an affirmative defense to certain crimes based upon the mental condition of the defendant at the time of the crime.\(^2\)

In *Samples*, Justice Brotherton further noted that, "[t]hose suffering from mental illnesses have a right to be treated and not punished. For this right to be meaningful, the criminal defendant must have a fair opportunity to present evidence of his insanity at trial and to rebut any evidence which would tend to prove his sanity."\(^3\) While the dicta contained in this footnote suggests a rational approach by the court to a very serious problem, the reality in today's criminal justice system is that the mentally ill continue to be particularly vulnerable to criminal discovery rules. These rules apparently deny the mentally ill the information necessary to assert a defense based upon their illness.

West Virginia has made great strides since the 1960's in the liberalization of discovery in the criminal setting.\(^4\) Yet, many areas remain where improvement is necessary. As then Supreme Court Justice William J. Brennan, Jr., said, "the quest for better justice is a ceaseless quest . . . . Law's evolution is never done, and for every improvement made there is another reform that is overdue."\(^5\) This Note is focused on one such area — the lack of pretrial disclosure of police reports and witness statements as it relates to the defendant's "fair opportunity to present evidence of his insanity at trial."\(^6\) Section II of this Note illustrates the seriousness of the problem with the current discovery process in criminal trials through the use of a dramatized scenario. Section III of this Note presents the elements of the debate concerning psychological defenses in criminal trials as they relate to the discovery process. Section IV looks at the various alternatives available to defense counsel in West Virginia when faced with the situation laid out in Section II. And finally,

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\(^2\) *MODEL PENAL CODE* § 4.01 cmt. 156 (Tentative Draft No. 4, 1955).

\(^3\) *Samples*, 328 S.E.2d at 194 n.4.


\(^6\) *Samples*, 328 S.E.2d at 194 n.4.
Section V concludes with a proposal for revamping the discovery rules in West Virginia to place the burden of non-production on the prosecution in criminal trials.

II. THE SCENARIO

Consider the following situation. An indigent, Rogers, is charged with the first-degree murder of his ex-wife’s new husband. Rogers allegedly drove to his ex-wife’s home, met the new husband in front of the house and, after a brief argument, shot the new husband with a rifle. Suppose also that Rogers has a history of mental difficulties.

A local attorney is appointed to represent Rogers. Upon evaluation of the case, the defense attorney contacts a local psychiatrist to examine Rogers to determine his mental capacities. Since Rogers is charged with first-degree murder, the defense attorney wants to know if Rogers formed the necessary criminal intent to be convicted of premeditated murder.

The defense psychiatrist proceeds to collect the necessary information for her examination and report. To that end, she writes a letter to the prosecuting attorney seeking the police report, along with any eyewitness statements, concerning the alleged crime. In the letter, the defense psychiatrist indicates her need for such information to make an informed and proper assessment of Rogers’ condition. The request for this type of information is standard operating procedure for the defense psychiatrist anytime she is asked to perform a criminal responsibility evaluation. In the past, she has routinely received open access to the prosecution’s files.

Contrary to the defense psychiatrist’s previous experiences, the prosecuting attorney refuses this request. The prosecuting attorney indicates that the defense is not entitled to any of this information prior to trial. Therefore, he will not provide the information to the defense psychiatrist. Instead, the prosecuting attorney petitions for a government psychiatric evaluation pursuant to the Rules of Criminal Procedure. The court grants the prosecution’s request. Rogers is ordered to report

7 The preceding dramatized scenario is based in large part on the real events of State v. Allen. State v. Allen, No. 95-F-72-1 (15th Cir. W. Va. 1995). Telephone Interview with William Fremouw, William Fremouw, Ph.D. & Associates, Morgantown, W. Va. (Jan. 29, 1997). Interview with James M. Pool, in Clarksburg, W. Va. (Jan. 28, 1997). The information used to formulate this scenario was gleaned from the public records maintained by the Circuit Clerk of Harrison County for the Allen case and interviews with the defense attorney and psychologist. Allen is now the subject of a Petition for Appeal to the Supreme Court of Appeals of West Virginia. Pet. for Appeal, Allen v. State, No. 95-F-72-1 (15th Cir. W. Va. 1995). The appeal is based upon the discovery issue, along with several other important but unrelated issues.

8 W. VA. R. CRIM. P. 12.2(c) provides that “[i]n an appropriate case the court may, upon motion of the attorney for the state, order the defendant to submit to a mental examination by a psychiatrist or other expert designated for this purpose in the order of the court.” Id.
for an evaluation by the state’s psychiatrist. Naturally, the government psychiatrist is given access to the police report and the eyewitness statements for his pretrial assessment.

The defense attorney asks his psychiatrist to proceed with her evaluation anyway. The defense psychiatrist’s report indicates that Rogers was likely functioning with diminished capacity at the time of the alleged crime, but notes that her evaluation is incomplete without the information she originally sought from the prosecution. The defense attorney immediately moves for a court order for the production of the subject information by the prosecution.9

At the hearing on the defense motion, the prosecution points out that Rule 16(a)(2) of the West Virginia Rules of Criminal Procedure specifically exempts such information from pretrial discovery by the defense.10 The defense attorney argues that, under Rule 16(a)(1)(C), the information was “material” for the preparation of the defense case.11 The defense attorney also indicates that he will not seek personal disclosure of the information. Rather, some sort of court supervised review of the documents by the psychiatrist alone is sufficient for his purposes.12 He desires no

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9 Rule 16(a)(1)(C) of the West Virginia Rules of Criminal Procedure, which is identical to the Federal Rule of the same number, provides in pertinent part:

(C) Documents and Tangible Objects.—Upon request of the defendant, the state shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody and control of the state, and which are material to the preparation of the defense or are intended for use by the state as evidence in chief at the trial, or were obtained from or belong to the defendant.


Rule 16(d) gives the court, upon motion by the requesting party, the power to order the non-moving party to comply with a discovery request. W. Va. R. Crim. P. 16(d)(1), 16(d)(2).

10 Rule 16(a)(2) provides in pertinent part:

(2) Information Not Subject to Disclosure.—Except as provided in paragraphs (A), (B), (D) and (E) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda or other internal official documents made by the attorney for the state or other state officials in connection with the investigation or prosecution of the case, or of statements made by state witnesses or prospective state witnesses except as provided in Rule 26.2.


12 The court is vested with the authority to “restrict” the discovery requested and to “specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.” W. Va. R. Crim. P. 16(d)(1), (d)(2).
further use of the requested documents, other than the review by the psychiatrist for preparation of the expert report and subsequent testimony. The trial court agrees that such information is exempt from pretrial discovery and denies the defense motion. Acting upon a motion by the prosecution, the trial court further orders that, upon any mention of the unproduced information, the court will immediately instruct the jury that the prosecution was well within their rights to deny the subject information to the defense.

At the trial of the matter, the defense tries to poke holes in the prosecution’s case through cross-examination. However, when it is time to proceed with Rogers’ case-in-chief, the defense attorney cannot put the defense psychiatrist on the stand. The defense attorney knows that the prosecution still has the initial letter from the psychiatrist seeking the documentation. He knows that, on cross-examination, his expert witness will be forced to admit that the examination was incomplete without the sought-after information. Additionally, he knows that after the prosecution has used that admission to destroy his expert, the trial court will instruct the jury that the prosecution had acted properly and with full authority in denying the information to the defense. His expert witness is a “sitting duck” for the prosecution. The prosecution will never have to call their own expert (such a move will likely entitle the defense to receive the sought-after information after the prosecution expert testified under Rule 26.2 of the West Virginia Rules of Criminal Procedure). After the defense expert has been destroyed, there will be no need for rebuttal. So, after all is said and done, the defendant is left without a viable defense as to the issue of criminal intent and is found guilty by the jury of murder in the first-degree.

III. THE INSANITY DEFENSE DEBATE: EASY ROAD TO FREEDOM OR RESPONSIBILITY CALCULUS

The above-described situation is entirely possible under the common-law-based discovery portions of the West Virginia Rules of Criminal Procedure. At the same time that the mental health sciences are trying to grapple with serious problems in the area of accurate diagnosis of insanity and diminished capacity (as it relates to

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13 Rule 26.2(a) of the West Virginia Rules of Criminal Procedure, which is identical to Rule 26.2(a) of the Federal Rules of Criminal Procedure, provides in pertinent part:

(a) Motion for production. —After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the state or the defendant and the defendant's attorney, as the case may be, to produce for examination and use of the moving party any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified.

W. VA. R. CRIM. P. 26.2(a).
the legal definitions), the legal system is undergoing serious changes in the area of the insanity defense and related alternatives. Also, on top of this hostile environment, the common law criminal discovery process provides the government with yet another tool to restrict criminal defendants’ access to vital information.

A. The Criticisms of Mental Health Defenses

Two different criminal defenses dominate the debate on mental health and the law — insanity and diminished capacity. Both defenses are concerned with the mens rea requirements of certain crimes, but they operate in totally different ways. Not Guilty By Reason of Insanity (NGRI) is an affirmative defense. NGRI absolves the defendant of any blame due to a significant mental impairment existing at the time of the alleged offenses such that the defendant can not form any of the

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14 Seymou R. Halleck, The Mentally Disordered Offender 51 (1986). Dr. Halleck asserts that:

In the process of determining insanity, the criminal justice system almost always requests the assistance of psychiatrists and psychologists. They are asked to evaluate defendants some time after the crime has taken place and to speculate about their mental condition at the time of the crime. . . . Even if defendants appear to be mentally ill at the time of the insanity examination, it is not easy to determine if this illness was present or if it in fact exerted significant influence upon them at the time of their crimes.

Id.; see also infra notes 73-88.

15 See infra notes 34-38.

16 One commentator has explained that:

Pretrial discovery is the disclosure of information about a case prior to the commencement of the trial. In civil cases . . . [t]his process, when properly employed, virtually eliminates trial by surprise. In criminal cases, however, almost the reverse is true; defense counsel is frequently surprised at trial by some unknown development. This perplexing situation is due to the common law, which precludes all pretrial discovery in criminal cases. Thus, the seemingly absurd result arises from this common law rule when parties to a minor civil suit receive all the information they need to adequately prepare for their day in court, but a defendant on trial for murder has extremely limited access to information in the hands of the prosecutor.

Pyles, supra note 4, at 561.


18 Id. at 354.
mental requirements necessary to the offense. On the other hand, the defense of diminished capacity argues that the defendant did not have the necessary specific intent required to be convicted of the underlying offense. Unlike insanity, diminished capacity does not absolve the defendant of any criminal wrongdoing. The defense of diminished capacity merely seeks to lower the offense to one not involving specific intent because the defendant was only capable of general intent due to his or her mental defect. Both defenses have come under increasing attack, as illustrated by the cases of John W. Hinckley, Jr. and Jeffrey Dahmer.

The Hinckley and Dahmer cases garnered wide publicity for criminal responsibility assessments. Both cases drew nationwide attention to the issue of psychiatric defenses to criminal charges. Hinckley, the would-be assassin of then President Ronald Reagan, was found not guilty by reason of insanity. An ABC News poll taken after the Hinckley verdict indicated that seventy-six percent of Americans believed that justice had been denied. Within one month after Hinckley was found not guilty by reason of insanity, another public opinion poll found that eighty-seven percent of the respondents "viewed the insanity defense as a loophole." The same survey found that, based upon the information they had, only 14.7% of the respondents would have found Hinckley not guilty by reason of insanity.

In contrast to Hinckley, Jeffrey Dahmer, the cannibalistic mass murderer

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19 Id. at 353.

20 HALLECK, supra note 14, at 59-60.

21 Clark, supra note 17, at 353.

22 Id.


24 Id.

25 Id.

26 Id.


28 Id.
from Milwaukee, was unsuccessful in his insanity plea. Yet, similar sampling surrounding the Dahmer case showed considerable disturbance about the insanity plea and relief that it failed. Most importantly, however, in both cases, "public opinion was generally negative not only as to the insanity defense but also as to the psychiatric testimony." The basic fear has been that the insanity plea provides "psychotic killers" with an "easy road to freedom." A recent poll showed that eighty-seven percent of the respondents believe that the insanity defense "allows too many guilty people to go free."

Hinckley's acquittal apparently catalyzed a trend toward eliminating the availability of these defenses. In 1984, Congress enacted the Insanity Defense Reform Act, with the intent of eliminating the use of misconduct-excusing affirmative defenses. At least twelve jurisdictions have adopted the Guilty But Mentally Ill alternative. Montana, Idaho and Utah have gone so far as to eliminate the insanity defense, although they have left the door open to element-specific defenses, such as diminished capacity. All told, between 1978 and 1990, some 124 different attempts were made to reform the insanity defense in thirty-four

29 SLOVENKO, supra note 23, at 1.
30 Id.
31 Id.
32 Id. at 179.
33 Id. at 180.
34 HALLECK, supra note 14, at 50.
36 Golding & Roesch, supra note 27, at 412. "Then United States Attorney General William French Smith was more blunt and predicted that adopting the guilty but mentally ill (GBMI) option 'would effectively eliminate the insanity defense.'" Id. at 409 (citations omitted).

The method by which the GBMI verdict was designed to eliminate the insanity defense was subtle. The GBMI verdict was not intended to replace the NGRI verdict. Id. at 413. Instead, the GBMI verdict was designed to give jurors a middle ground between guilty and NGRI. Id. The GBMI verdict was "intended to make it harder to reach a verdict of [NGRI] (especially in gray areas of severe personality disorder) with the hope that most jurors would respond to the superficial logic of the verdict ('Okay, he's crazy, but he did it, didn't he?')." Id.
jurisdictions.\textsuperscript{38} Unfortunately, the premises upon which these criticisms and attempts to eliminate mental health defenses are based fail upon closer examination.

The underlying belief that mental defenses are growing in number is false. In actuality, the assertion of the insanity defense is relatively rare.\textsuperscript{39} The insanity defense is successfully applied in less than one percent (actually 0.7\%) of all felony cases.\textsuperscript{40} Although no concrete numbers exist, the defense of diminished capacity is generally believed to be even less commonplace than the insanity defense.\textsuperscript{41} Contrary to notions of abuse of the insanity defense, studies have shown that practically all of those actually found not guilty by reason of insanity are among the most disturbed individuals.\textsuperscript{42}

Likewise, the fear that these defenses are "easy road[s] to freedom"\textsuperscript{43} is unfounded. Those adjudged to be criminally insane generally serve sentences equal to their sane counterparts.\textsuperscript{44} The overwhelming majority of the cases are settled by


\textsuperscript{40} Golding \& Roesch, \textit{supra} note 27, at 413 n.*.

\textsuperscript{41} Clark, \textit{supra} note 17, at 352.

\textsuperscript{42} According to one study:

Only 10 percent of the population raising the defense did not receive a DSM-III diagnosis, and the large majority had a prior hospitalization. Furthermore, only the most disturbed defendants were successful in their plea. The popular concept that the insanity defense is an "easy out" for defendants who are either feigning mental illness or who claim temporary insanity is clearly untrue.

Callahan et al., \textit{supra} note 39, at 337.

\textsuperscript{43} SLOVENKO, \textit{supra} note 23, at 179.

\textsuperscript{44} Golding and Roesch have stated that "postacquittal release procedures are quite strict in most states, and most of the available evidence indicates that [not guilty by reason of insanity] acquttees spend as much or more time confined as do those convicted of similar crimes." Golding \& Roesch, \textit{supra} note 27, at 413 n.* (citations omitted).
agreement, without going to a jury. In most situations, the various professionals, including prosecution experts, agree about the diagnosis of the defendant. Nonetheless, the fear of crime and insensitivity to the mentally ill has made the public skeptical of the insanity defense. The media are partly to blame.

The occasional contested case (such as Hinckley or Dahmer) receives all of the media attention and fans the flames of discontent. The public depends on the media for most of its information about the criminal justice system. Unfortunately, the media focuses its attention on "uniquely aberrational" high profile cases, such as Lorena Bobbitt and the Menendez brothers. The notoriety of these cases has fueled the public fear that the justice system is replete with such "daytime talk show" defendants. This hapless development unfairly maligns and improperly distorts the prevalence of psychological defenses.

Commentators conducting an eight state survey have observed that:

Finally, these data indicate that the decision to acquit someone was seldom made by a jury; only seven percent of 2,500 acquittals were disposed of by a jury. Rather, the decision to acquit was made by other key players in the criminal justice process including the prosecutor, defense attorney, and judge. It's clear that negotiation plays a central role in the insanity plea, just as it does in other areas of the criminal justice process.

Callahan et al., supra note 39, at 337.

According to one group of commentators:

Although the insanity defense is frequently portrayed as a war between hired guns, in Baltimore City, at least, there is remarkable agreement between both sides. Only two cases (1.4% of those pleading NCR and 0.02% of all those indicted in Baltimore City during the same time period) had full-blown insanity trials. With respect to the remaining defendants, they either dropped their insanity pleas, or else all sides agreed as to the defendant's insanity.

Janofsky et al., supra note 39, at 210.

Shoop, supra note 37, at 99.

Janofsky et al., supra note 39, at 210.


Id.

Id. at 705-07.

B. The Role of Cognitive Responsibility in the Criminal Justice System

The rush to eliminate the insanity defense and related alternatives is especially troubling because of the central role of such defenses in our criminal justice system. The issue of mens rea or a "guilty mind" has been fundamental to our system of criminal justice since its inception. One of the fundamental principles of Anglo-American law is that mental guilt, or mens rea, must be involved in the commission of certain crimes. If the mental elements of the crime are not present, the conviction cannot be sustained. These offenses are generally referred to as specific intent crimes. Specific intent offenses generally involve a higher level of criminal liability than general intent offenses and are done purposefully or knowingly.

Our American system of justice is infused with notions of morality. Those individuals who act contrary to the community's established norms deserve punishment if they are "fully blameworthy." Conversely, if an individual is not fully able to appreciate the blameworthy nature of her conduct, then the same level of punishment is not appropriate. As Professor H.L.A. Hart explained:

Commentators have noted that:

It is well established within the historical and jurisprudential literatures that the fundamental concept of mens rea within Judeo-Christian cultures has been in existence since the earliest recordings of Hebrew law. . . . One can show that the entire structure of the criminal law is built upon this principle. No society seems ever to have been without this means, even if archaic.

Golding & Roesch, supra note 27, at 397-98 (citations omitted).

Clark, supra note 17, at 352.

Id. at 352.

A specific intent crime is defined as a "[c]rime in which [the] defendant must not only intend the act charged, but also intend to violate law. One in which a particular intent is a necessary element of the crime itself." BLACK'S LAW DICTIONARY 973 (abr. 6th ed. 1991); see also Clark, supra note 17, at 353.

Clark, supra note 17, at 353.


Woodmansee, supra note 38, at 370.

Id.
At the conviction stage, if punishment is to be justified at all, the criminal’s act must be that of a responsible agent: that is, it must be the act of one who could have kept the law which he has broken. And at the sentencing stage, the punishment must bear some sort of relationship to the act: it must in some sense “fit” or be “proportionate.”

In this regard, psychological and psychiatric testimony is generally regarded by most jurisdictions as both germane and helpful to the criminal justice system. Jurors must assess the defendant’s mental condition — his capacity to make knowing and conscious choices — before they can assign blame. Judges and juries rely upon the expert opinions of mental health professionals in determining the proper disposition of persons asserting these defenses.

The insanity and diminished capacity defenses serve another important purpose for the criminal justice system. These defenses reserve exculpation for the most severely impaired defendants. By necessary implication, all other defendants are responsible for their actions. As a result, the government can justify the use of its coercive power over those individuals. The substantive requirement of culpability legitimizes this exercise of power by restricting its use to those most responsible and lessening its impact over those less blameworthy. Likewise, the community’s criticism of criminal conduct is strengthened by the mental element requirement. As a consequence, the boundary between acceptable and

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63 Woodmansee, supra note 38, at 369.
64 Clark, supra note 17, at 352.
65 HALLECK, supra note 14, at 47.
66 Id.
67 Arenella, supra note 58, at 1533.
68 Id.
69 Id. at 1620.
acceptable behavior is reinforced.\textsuperscript{70}

Finally, rejection of mental condition defenses necessarily implies a lack of confidence in the science of psychology. Contrary to popular belief, "[w]ell trained and conscientious mental health professionals have always attempted to be punctiliously correct in the testimony they offer to the courts and have been at the forefront of attempts to reform standards of training and practice."\textsuperscript{71} Most of the attacks upon these experts appear to be politically motivated rather than factual.\textsuperscript{72}

As the following discussion shows, the forensic psychological community is seeking to prevent any future abuse of the insanity and diminished capacity defenses.

\section*{C. The Risk Of "Malingering"}

One of the persistent worries among those skeptical of defenses based upon mental defect is the fear of what scientists label "malingering." Malingering is the attempt on the part of an individual to deliberately deceive or create the impression of a mental disorder where none exists.\textsuperscript{73}

Malingering presents a particularly difficult problem for the forensic psychologist.\textsuperscript{74} The legal system asks the forensic psychologist to render an opinion as to the mental condition of a defendant at a point in time well before the date of the evaluation.\textsuperscript{75} In addition, the forensic psychologist must be on guard against the self-serving motivations of the patient.\textsuperscript{76} The job is even more difficult in view of...
the fact that the forensic psychologist is often required to perform this evaluation with only limited opportunity for interviewing the defendant and even less access to the accounts of others present at the time of the alleged crime. To provide an accurate diagnosis, these variables must be minimized.

Clearly, the delay between the event and the evaluation is often unavoidable. However, the access to the information variable is well within the control of the criminal justice system.

D. The Need for "Collateral" Information

To successfully negotiate around the possibility that the patient is actually "malingering," the scientific community has uniformly expressed the need for additional information. Commentator after commentator in the field of forensic psychology has called for the review of many sources of information, especially official accounts of the events of the crime and eyewitness statements.

Forensic psychological experts need access to additional records, including police reports, witness statements, family interviews, jail records, and any records concerning the defendant's post-arrest behavior. The reasoning is simple. Witnesses, in their own language, can describe how a person was behaving at the time of the event. Post-arrest records and police reports are significant, in that they can be compared to one another, and considered with the patient interview, to establish patterns in the defendant's behavior. All of this data is necessary to provide the "big picture" that is indispensable in the search for the truth about a


77 Thomas Grisso, Clinical Assessments for Legal Decisionmaking: Research Recommendations, in LAW AND MENTAL HEALTH 49, 60-61 (Saleem A. Shah & Bruce D. Sales, eds., 1991); SHAPIRO, supra note 73, at 12.

78 See infra notes 79-88 and accompanying text.

79 See infra notes 80-88 and accompanying text.

80 Grisso, supra note 77, at 60-61; SHAPIRO, supra note 73, at 12; Singe & Nievod, supra note 76, at 534.

81 SHAPIRO, supra note 73, at 51-52.

82 Id.

83 Id. at 52-53.
defendant's mental condition.  

The West Virginia Department of Health and Human Resources recognizes the need for full information in the evaluative process. The Department has issued a policy paper for the preparation of court-ordered psychological evaluations. The directive indicates, among other things, that:

The Department requests the Court's assistance in assuring that the following information on the individual to be evaluated is available at the time of admission to the unit.

- A copy of the police report of the alleged crime
- A copy of the evidence report
- A copy of any written or recorded statements made by the defendant, arresting officers, or witnesses to the alleged crime.

Thus, when West Virginia courts order a defendant to be evaluated, the state agency charged with this evaluation has a set of guidelines in place to prescribe what information is essential to the evaluation. Yet, when a defendant contracts with his own expert (which, by the way, often comes from the same pool of individuals used by the State), the adversarial nature of our system of justice presents a barrier to the acquisition of this vital information.

E. Roadblocks to the Production of Collateral Information

Despite the considerable liberalization of the discovery rules in criminal proceedings that has occurred over the past thirty years, many states, along with the federal system, still do not provide for the pretrial production of witness statements.

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84 Id. at 182-83.

85 BUREAU OF HUMAN RESOURCES, WEST VIRGINIA DEP’T. OF HEALTH AND HUMAN RESOURCES, CLIENT SERVICES POLICY NO. 3127, reprinted in EVALUATIONS FOR WEST VIRGINIA COURTS: A RESOURCE BOOK (Division of Mental Health and Community Rehabilitation Services ed., 1996).

86 Id. at 6.

87 The above guidelines were promulgated by the Department for the express purpose of outlining the procedures to be followed when the Department is called upon by the courts to evaluate a defendant. Id. at 1.

88 SHAPIRO, supra note 73, at 51.
or other documents.\(^8^9\) Many of the most important documents in a criminal case are "material to the preparation of the defense" as defined by Rule 16(a)(1)(C) of the Federal Rules of Criminal Procedure (and the identical provision of the West Virginia Rules)\(^9^0\) and are specifically exempted from production by the corresponding provision of Rule 16(a)(2).\(^9^1\)

Under West Virginia law, police reports are not discoverable, unless used at trial to refresh recollection.\(^9^2\) Likewise, defense investigator’s reports are not subject to pretrial discovery.\(^9^3\) In addition, witness statements obtained by the government are exempt from pretrial discovery, no matter how "material."\(^9^4\) In contrast to a civil litigant, a criminal defendant is, therefore, entitled to rather limited discovery, despite the rather broad looking provisions of Rule 16(a)(1)(C).\(^9^5\)

In addition, trial court discretion in this area is of little help to the defendant. Although the trial court has broad discretion in matters of discovery,\(^9^6\) the decision of the trial court in this regard is only reviewable when the trial court has abused its discretion.\(^9^7\) The only exceptions to this standard are the duty of the prosecutor to

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\(^{89}\) Brennan, supra note 5, at 10-11.

\(^{90}\) See supra note 9.

\(^{91}\) See supra note 10.


\(^{94}\) Audia, 301 S.E.2d at 210.

\(^{95}\) The United States Supreme Court has ruled that:

- A criminal defendant is entitled to rather limited discovery, with no general right to obtain the statements of the Government’s witnesses before they have testified. Fed. Rules Crim. Proc. 16(a)(2), 26.2. In a civil case, by contrast, a party is entitled as a general matter to discovery of any information sought if it appears “reasonably calculated to lead to the discovery of admissible evidence.” Fed. Rule Civ. Proc. 26(b)(1).


\(^{96}\) Audia, 301 S.E.2d at 201, Syl. Pt. 8 (invoking trial court denial to armed robbery defendant pretrial disclosure of police reports and witness statements); State v. Bennett, 339 S.E.2d 213, Syl. Pt. 4 (W. Va. 1985) (invoking prosecutorial withholding of court-ordered discovery of witness information); State v. Roy, 460 S.E.2d 277, 283 (W. Va. 1995) (invoking trial court denial of sexual assault defendant’s motion to compel production of victim’s counseling records).

turn over exculpatory information\(^9\) and the right of the defendant to review notes used by a witness to refresh his or her recollection.\(^9\) Neither exception provides for the pretrial discovery of the information necessary for a forensic psychologist's evaluation.\(^10\) Because Rule 16(a)(2) specifically excludes such information from pretrial discovery, it is hard to imagine how a trial court could order such production without abusing its discretion.

IV. ALTERNATIVES FOR ACQUISITION OF COLLATERAL INFORMATION

A. Due Process Challenges

The United States Supreme Court, in *Ake v. Oklahoma*,\(^11\) declared that indigent defendants have a constitutional right to the assistance of a competent psychiatric expert upon a preliminary showing that sanity will be an issue at trial.\(^12\) The principle underlying the decision in *Ake* was fundamental fairness under the due process clause of the Fourteenth Amendment.\(^13\) The Court in *Ake* noted that a criminal defendant, indigent or otherwise, has a constitutional right to the "basic tools of an adequate defense or appeal."\(^14\)

Certainly, the underlying premises of *Ake* apply to the instant debate. Although the Court in *Ake* did not address the constitutional issues of criminal discovery as they relate to the provision of a psychological expert, the implication is that issues of sanity or other mental defect are vital to the just administration of a criminal trial.\(^15\) Even though there is no general constitutional right to


\(^9\) *Bennett*, 339 S.E.2d at 220-21 n.5 (citing State v. Ashcraft, 309 S.E.2d 600, 606 n.4 (W. Va. 1983)).

\(^10\) W. VA. R. CRIM. P. 16(a)(2).


\(^12\) *Id.* at 83.

\(^13\) *Id.* at 76-77.

\(^14\) *Id.* at 77.

\(^15\) *Id.* at 80-81.
discovery, where the constitutional right to a “competent psychiatrist” collides with the pretrial discovery exceptions of Rule 16(a)(2), the constitutional right should prevail. Where the defendant is denied the discovery necessary to obtain a minimally competent psychiatric evaluation for purposes of their defense, “fundamental fairness” is in danger.

In addition, the situation described at the outset of this Note poses another constitutional problem. When a defendant’s psychological expert is denied access to the prosecution’s records, insofar as they relate to the events surrounding the alleged crime, a fundamental strategic advantage is gained by the prosecution.

For purposes of the forensic psychological evaluation, the prosecution’s records are unique. The statements obtained by the police from eyewitnesses will be the most proximate in time to the event. In addition, the police reports will contain conclusions from physical evidence at the scene of the alleged crime. Under the current Rules of Criminal Procedure, the defense will not be given access to this information until each of these witnesses testifies at trial (assuming that the prosecution uses all of its available witnesses). Therefore, the efficacy of any substitute information obtained by the defense in these regards will not be clear until after the fact. While this process may serve the defense for purposes of cross-examination, the forensic psychologist cannot use this information to realistically evaluate the defendant at this late juncture of a trial.

Furthermore, the prosecution is entitled to seek its own evaluation of the defendant under Rule 12.2 of the Rules of Criminal Procedure. The prosecution will provide all of the information in its possession to its own psychiatric expert. Thus, the prosecution’s expert will have the benefit of far more information upon


108 Id. at 77.

109 This information is used to reconstruct the event and compensate for the delay between the event and the psychological examination of the defendant. Grisso, supra note 77, at 60-61.

In fact, at least one jurisdiction has found a psychologist’s testimony inadmissible for failure to take into account the information gathered by the police investigating the crime. See State v. Jackson, 457 S.E.2d 862, 868-70 (N.C. 1995).


111 Golding & Roesch, supra note 27, at 420 (arguing that the information is needed prior to interviewing the defendant to compare the defendant’s statements against third-party statements).

112 See supra note 8.
which to base his or her expert opinion than will the defense expert.

The Supreme Court in *Ake* noted that "unlike a private litigant, a State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained."113 This would be the case in the instant situation. The strategic advantage gained by the prosecution and its expert would appear to have due process implications.

The Supreme Court of Appeals of West Virginia has also shown a disdain for prosecutorial advantages that mislead the jury. In *State v. Duell*, the court was faced with a question concerning competing psychological experts.114 In *Duell*, the prosecution's psychological expert performed tests which the prosecution failed to turn over to the defense.115 Applying notions of fair play and truthfulness, the court noted:

[T]he appellant was denied the opportunity to submit a second opinion to the jury based upon the same evidence available to the state psychiatrist. This could mislead the jury into believing that the state psychiatrist possessed a superior data base from which his opinion concerning the appellant's insanity was formulated.116

The Court in *Duell* appeared to be concerned with the one-sidedness that can result from having one expert operate from a position of advantage over the other in regard to the informational basis for his or her opinion.117 Such an interpretation of *Duell* would also support an exception to the normal pretrial discovery prohibitions in the case of forensic psychological experts. Surely, the important goal of giving the jury a full and complete picture is never more implicated than when the sanity of the defendant is at issue.118 A falsely manufactured result either way would cast a shadow over the whole criminal justice system.

However attractive on its face, though, a due process challenge to pretrial discovery is fraught with hardship. First, the Court in *Ake* did not address the


114 332 S.E.2d at 253.

115 Id. at 249.

116 Id. at 253.

117 Id.

118 Id. at 251, 253.
discovery issue. Second, the current test for state criminal due process cases is whether the state procedure “‘offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’” Although the mens rea of the defendant is an issue of traditional importance, the limiting nature of the criminal discovery process is also rooted in the common law tradition. Furthermore, the United States Supreme Court is reticent to disturb the rule-making authority of the individual states.

Third, beginning with its decision in Brady v. Maryland, the Supreme Court has consistently required that, to prove a violation of a criminal’s right of access to information, there must be a showing that the evidence was “material either to guilt or to punishment.” The Court in United States v. Bagley set the standard for “materiality” to be that the undisclosed evidence creates a “reasonable probability” that the outcome would have been different. As two commentators noted, taking into account the Bagley decision, “the pro-discovery position appears to have little chance of acceptance in the Court’s foreseeable future.”

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121 See Golding & Roesch, supra note 53 and accompanying text.

122 See Pyles, supra note 16 and accompanying text.

123 The Court has cautioned that: “[I]t has never been thought that [decisions under the Due Process Clause] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure.” Medina, 505 U.S. at 443-44 (quoting Spencer v. Texas, 385 U.S. 554, 564 (1967) (alterations in original) (citations omitted)).


125 Id. at 87.


127 Id. at 682.

B. Liberal Interpretation of Rule 16(a)(1)(C)

Liberal application of the concept of "materiality" within the context of Rule 16(a)(1)(C) of the West Virginia Rules of Criminal Procedure may satisfy the need for a solution. At least one commentator argued for a similar interpretation in the area of selective prosecution charges. However, such an interpretation is clouded by recent jurisprudence. This interpretation of Rule 16 was rejected by the United States Supreme Court in the recent case of United States v. Armstrong. Chief Justice Rehnquist, writing for the majority, expressly rejected this application to the area of selective prosecution as unrelated to the Government's "case-in-chief."

The Armstrong decision did, however, leave the door open to such an interpretation in areas such as psychiatric defenses. Chief Justice Rehnquist, in his majority opinion, focused the debate on the symmetry of the language of Rule 16. While not speaking to the conflict between Rule 16(a)(1)(C) and Rule 16(a)(2), the Chief Justice did indicate by inference that had the information been related to a defense against the prosecution's "case-in-chief," it would be discoverable as "material to the preparation of the defendant's defense" under Rule 16(a)(1)(C), even though Rule 16(a)(2) exempts such evidence. The reasoning of the majority in Armstrong implies that Rule 16(a)(1)(C) takes precedence over Rule 16(a)(2). In response to the defendant's request, the Court could have merely said that the protection afforded by Rule 16(a)(2) was absolute. The Court, instead, went to great lengths to define the request out of Rule 16(a)(1)(C), thereby implying that Rule 16(a)(1)(C) is where the real test is focused.

Justice Breyer's concurring opinion in Armstrong lends further support to this position. Justice Breyer, while not agreeing that Rule 16(a)(1)(C) is limited to defenses to the "case-in-chief," pointed out that the history of Rule 16 indicates an

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129 The West Virginia rule is identical to the federal rule. W. VA. R. CRIM. P. 16(a)(1)(C); FED. R. CRIM. P. 16(a)(1)(C). Because there is no reported history of the West Virginia Rules of Criminal Procedure, the history and jurisprudence of the Federal Rules of Criminal Procedure has been substituted for the purposes of this Note.


132 Id. at 1485.

133 Id.

134 Id.
intent for it to be a starting point for broadening discovery rights.\textsuperscript{135}

This option has some linguistic appeal. However, such an attempt depends upon a landmark judicial opinion. As previously noted, the Supreme Court of Appeals of West Virginia routinely defers to trial court discretion in matters of discovery.\textsuperscript{136} If the trial court dismisses the defendant's argument, there is little hope of reversal. Even if the trial court accepts the defendant's argument, the Supreme Court of Appeals of West Virginia will likely avoid establishing a precedent and leave such decisions to case-by-case analysis. Thus, the necessary rule of law will not be forthcoming.

V. PROPOSAL TO RE-WRITE RULE 16 TO REVERSE THE DISCOVERY BURDEN

The answer offering the best balance between the rights of criminal defendants to present meritorious defenses and the governmental interest in swift, sure justice is the reformation of Rule 16 in such a way as to place the burden of non-production on the prosecution. Two other commentators have suggested just such a general liberalization of discovery in criminal proceedings.\textsuperscript{137} The rationale

\textsuperscript{135} Justice Breyer reasoned that:
Rather, the language and legislative history make clear that the Rule's drafters meant it to provide a broad authorization for defendants' discovery, to be supplemented if necessary in an appropriate case. Whether or not one can also find a basis for this kind of discovery in other sources of law, Rule 16(a)(1)(C) provides one such source, and we should consider whether the defendants' discovery request satisfied the Rule's requirement that the discovery be "material to the preparation of the defendant's defense."

\textit{Id.} at 1491 (Breyer, J., concurring).

\textsuperscript{136} See supra notes 96-100 and accompanying text.

\textsuperscript{137} See Sarokin & Zuckerman, supra note 128, at 1089. Certainly, the liberalization of discovery in all criminal proceedings would have profound consequences, which are beyond the scope of this Note. However, in responding to the continuing criticisms of criminal discovery reform, the authors state:

Such arguments have validity, however, only if we are willing to cast aside certain fundamental tenets of our criminal justice system. If criminal defendants are truly presumed innocent until proven guilty, then blanket policies that delay defendants' access to the government's witness lists and deny access to witness statements until after those witnesses have testified cannot be justified. These policies are premised upon the fear that defendants will commit further crimes in order to clear themselves of the charges for which they are being tried. In sum, the presumption is one of guilt, not innocence. The contention that restrictions on discovery are necessary to offset the government's difficult standard of proof is equally unsound. The imposition of restrictions on defendants to counter the government's standard substantially diminishes that standard, and
is that civil litigants should not be accorded more rights under our system than criminal defendants. \(^{138}\) Ironically, the civil discovery process is not without its critics. Many have argued for limitations on civil discovery because of the apparent costs and court delays. \(^{139}\) Still, the suggestions for placing the burden on the prosecution to resist discovery have a great deal of appeal. \(^{140}\)

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thus does not constitute a valid justification for their existence. If the function of a criminal trial is really a quest for the truth, to maintain that the adversary system depends on the limitation of defendants’ access to information runs contrary to that quest. Civil litigation is no less adversarial because of its unrestricted discovery, and the truth is more likely to be uncovered when information is revealed in time for its meaningful use at trial, than when it is belatedly produced or entirely withheld.

*Id.* at 1091-92.

\(^{138}\) Commentators observe that:

It is an astonishing anomaly that in federal courts virtually unrestricted discovery is granted in civil cases, whereas discovery is severely limited in criminal matters. In other words, where money is involved, all parties receive all relevant information from their adversaries upon request; but where individual liberty is at stake, such information can be either withheld by the prosecutor or parcelled out at a time when it produces the least benefit to the accused.

*Id.* at 1089.


\(^{140}\) The suggestions range from going to full disclosure, much like the Federal Rules of Civil Procedure, to liberally modifying the current Rules of Criminal Procedure in the following ways:

Regardless of whether federal courts will recognize a constitutional right of criminal discovery, it is evident that if discovery is to be afforded any time soon, it is a task for the legislature. Congress should heed the experience of states, such as New Jersey, that permit open discovery for criminal defendants. The concerns that gave rise to the enactment of the Jencks Act on the federal level have not been borne out in the state courts. By studying the positive consequences of such state court discovery provisions, both the federal government and courts can better evaluate the usefulness and validity of the Jencks Act and other restrictions on discovery. We offer the following recommendations:

1. **Repeal or modify the Jencks Act**

The Jencks Act is a powerful enemy of discovery in federal criminal prosecutions. It reflects an overly broad policy that disadvantages all defendants for the sake of trying to prevent the potential misconduct of a few. Denying all defendants access to pretrial statements made by government witnesses out of the fear that some will use such information wrongfully can be likened to outlawing the institution of bail on the theory that some of those arrested might commit further crimes. Such fears may indeed be well-founded in specific circumstances, and in such cases, as in rare instances when bail is not granted, judges should have the authority to impose particular restrictions on discovery. Otherwise, open discovery should be the rule,
The State of New Jersey offers an example for possible adoption. New Jersey has the equivalent of civil procedure discovery in the criminal setting.\footnote{New Jersey Rules Governing Criminal Practice provide: 3:13-3. Discovery and Inspection (c) Discovery by the Defendant. The prosecutor shall permit defendant to inspect and copy or photograph the following relevant material if not given as part of the discovery package under section (b): (1) books, tangible objects, papers or documents obtained from or belonging to the defendant; (2) records of statements or confessions, signed or unsigned, by the defendant or copies thereof, and a summary of any admissions or declarations against penal interest made by the defendant that are known to the prosecution but not recorded; (3) results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the matter or copies thereof, which are within the possession, custody or control of the prosecutor; (4) reports or records of prior convictions of the defendant; (5) books, papers, documents, or copies thereof, or tangible objects, buildings or places which are within the possession, custody or control of the prosecutor; (6) names and addresses of any persons whom the prosecutor knows to have relevant evidence or information including a designation by the prosecutor as to which of those persons may be called as witnesses; (7) record of statements, signed or unsigned, by such persons or by co-defendants which are within the possession, custody or control of the prosecutor and any relevant record of prior conviction of such persons; (8) police reports which are within the possession, custody, or control of the prosecutor; (9) names and addresses of each person whom the prosecutor expects to call to trial as an expert witness, the expert’s qualifications, the subject matter on which the expert is expected to testify, a copy of the report, if any, of such expert witness, or if no report is prepared, a statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. Except in the penalty phase of a capital case if this information is requested and not furnished 30 days in advance of trial, the expert witness may, upon application for.}
New Jersey's criminal procedure allows for the pretrial production of police reports, witness statements, and other documents. However, New Jersey's liberal discovery rule is reciprocal. If a defendant chooses to make use of the liberal discovery rule, the prosecution has the right to similar discovery in return. The New Jersey system, like many other state systems, leaves the choice of initiating the discovery process to the defendant.

The New Jersey approach provides the best alternative to the status quo in West Virginia, at least where psychological defenses are concerned. As shown in Sections II and III, the mentally ill defendant is being deprived of viable defenses under the current rules. If Rogers had the benefit of N.J. R. Crim. P. 3:13-3(c), the

by the defendant, be barred from testifying at trial.

142 N.J. R. Crim. P. 3:13-3(c)(8).


144 N.J. R. Crim. P. 3:13-3(c)(5).

145 Rule 3:13-3(d) provides:
(d) Discovery by the State. A defendant shall permit the State to inspect and copy or photograph the following relevant material if not given as part of the discovery package under section (b):
(1) results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the matter or copies thereof, which are within the possession, custody or control of defense counsel;
(2) any relevant books, papers, documents or tangible objects, buildings or places or copies thereof, which are within the possession, custody or control of defense counsel;
(3) the names and addresses of those persons known to defendant who may be called as witnesses at trial and their written statements, if any, including memoranda reporting or summarizing their oral statements;
(4) written statements, if any, including any memoranda reporting or summarizing the oral statements, made by any witnesses whom the State may call as a witness at trial;
(5) names and address of each person whom the defense expects to call to trial as an expert witness, the expert's qualifications, the subject matter on which the expert is expected to testify, and a copy of the report, if any, of such expert witness, or if no report is prepared, a statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. Except in the penalty phase of a capital case if this information is requested and not furnished 30 days in advance of trial the expert may, upon application by the prosecutor, be barred from testifying at trial.


146 Sarokin & Zuckerman, supra note 128, at 1108 n.91.
prosecution would be forced to seek relief to avoid the production requirements. The prosecutor would have to show special circumstances to obtain this relief. Neither the defense psychiatrist nor the defense attorney would be forced to justify their request and thereby undermine Rogers' defense before it even begins. In such a situation, both defense and prosecution experts would operate from the same information. Thus, the balanced picture that concerned the Supreme Court of Appeals of West Virginia in Duell would come to pass.

By reversing the burden of production so that full disclosure is encouraged in all but the most exigent circumstances, the New Jersey alternative offers the best possible situation for the defendant and the system alike. Pretrial disclosure would enable the forensic experts to function with full information. In such an environment, the odds are increased that general agreement will be reached between the experts. In addition, the likelihood of plea negotiation may increase. Past experience shows that, where proper psychological evaluations are conducted, trial of the matter is rarely necessary. In this regard, the liberated discovery environment may lead to greater judicial efficiency.

VI. CONCLUSION

The mentally ill, much like the indigent, deserve constitutional protection. Indigent defendants receive the protection of the due process clause of the Fourteenth Amendment precisely because they are powerless to protect their rights without the help of the State. The mentally ill are in a similar situation. Without the aid of the State, in the form of pretrial discovery, the mentally ill become powerless to assert their rights through the presentation of psychiatric testimony. The United States Supreme Court recognized an indigent’s right to psychiatric testimony in Ake. Utilizing the rationale of the Court in Ake, there would appear to be due

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147 See supra notes 79-88 and accompanying text.

148 See supra note 46 and accompanying text.

149 Brennan, supra note 5, at 2. Then Supreme Court Justice William J. Brennan, Jr., noted that "a guilty defendant is more likely to plea-bargain and plead if the prosecution discloses to him a strong government case." Id.

150 See supra note 45 and accompanying text. In addition, the Baltimore City study showed that, out of 127 defendants asserting a defense of Not Criminally Responsible (NCR), all but 16 dropped the defense before trial, 13 of those were stipulated to by the prosecution, one was dropped on a technicality, and only two went to trial with opposing experts, with one being found guilty. See Janofsky et al., supra note 39, at 207.

process reasons for assuring that all who warrant a psychiatric defense be allowed to present such a defense. As one commentator put it, “Conflating many issues into single rhetorical attacks runs the grave risk of depriving mentally disordered defendants of their right, both moral and constitutional, to have a detailed analysis of their mental state presented to the jury when it is at issue as an element of the offense....”

Denying forensic psychologists who are asked to assist our legal system the necessary information upon which to form their opinions encourages them to ignore their own scientific realities. “Malingering” is a real concern which forensic psychologists must grapple with everyday. The literature indicates that exposure to the fullest possible range of “collateral information” is the only way to begin to ferret out the pretenders. Our legal system cannot continue to seek the assistance of these experts and deny them and their patients the tools necessary for them to be accurate in their opinions.

Beyond the possible due process implications, the provision of pretrial discovery to defendants for the purposes of asserting a defense based upon mental disease or defect is the only way to ensure the sanctity of the process. To preclude the discovery of this vital information, at the very least, casts a shadow of illegitimacy on the process, and, at worst, perpetuates a fraud upon the juries of this country. Finally, the loosening of the discovery noose promises concrete advantages to the criminal justice system in the way of increased agreement between experts, increased plea bargaining, and less gamesmanship in the administration of justice. It’s time to stop “kicking the dog” and open up the criminal discovery process.

J. Robert Russell*

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152 Golding & Roesch, supra note 27, at 424 (citations omitted).

153 See supra notes 79-88 and accompanying text.

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