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IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-vs-	:	Case No. 16922
MELVIN JAMES WORKMAN,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM A JURY VERDICT OF GUILTY OF RAPE AND BURGLARY IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE ERNEST F. BALDWIN, JUDGE, PRESIDING

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APR - 6 1981

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE

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Plaintiff-Respondent,

-vs-

MELVIN JAMES WORKMAN,

Defendant-Appellant.

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IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH, Plaintiff-Respondent, -vs- MELVIN JAMES WORKMAN, Defendant-Appellant.	:	Case No. 16922

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The appellant, Melvin James Workman, was charged with rape, a second degree felony in violation of Utah Code Ann. § 76-5-402 (1953), as amended, and aggravated burglary, a first degree felony, in violation of Utah Code Ann. § 76-6-203 (1953), as amended.

DISPOSITION IN THE LOWER COURT

Appellant was tried by the Honorable Ernest F. Badlwin, Jr., sitting without a jury, and was found guilty of rape and burglary in the Third Judicial District Court for Salt Lake County. Appellant was sentenced to serve an indeterminate term of not less than one year nor more than fifteen years for both offenses, which sentence was to run consecutively.

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RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the conviction in the lower court.

STATEMENT OF THE FACTS

At trial, the State called several witnesses, the most important of whom, for purposes of this brief were Deana English, the victim, Catherine Workman, defendant's mother, and Connie Riley, a friend of the defendant. Prior to the selection of the jury, which had been called and was present in the courtroom, appellant indicated his desire to be tried by Judge Baldwin instead of a jury.

Deana English testified that on February 19, 1979, she was awakened at about 1:00 a.m. by a man who had entered her apartment at 3378 South Fifth East. The man placed his hand over her mouth and told her that he had a gun. She was also told not to scream (Tr.15,18). Almost immediately the man turned her on her stomach and placed a pillow over her head. The pillow was held there by her assailant during the remainder of the assault. After several attempts the victim was raped (Tr.23).

After the act of intercourse was completed the victim began to scream. Her assailant, upon hearing

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the screaming, immediately left the apartment (Tr.23). Deana English was unable to identify the appellant at trial due to the fact that she did not have an opportunity to see her assailant. However, she testified that some ten to fifteen minutes after her assailant left she observed a wallet on the floor of her apartment. She testified that this wallet was not hers, and that it did not belong in her apartment, and that it was not in her apartment when she had gone to bed (Tr.27,28).

Mrs. Catherine Workman, appellant's mother, was called as a witness and identified the wallet and its contents as belonging to appellant, Melvin Workman (Tr.152).

Connie Riley testified to three telephone conversation she had had with the appellant, his mother, and his brother, Jim Workman. The last telephone conversation occurred around 7:30 a.m., February 19, 1979, and was initially between Catherine Workman and Connie Riley (Tr.88,89). Connie Riley testified that during this conversation the telephone was passed back and forth between appellant and his mother. During this conversation, Connie Riley was informed that the appellant had entered an apartment and had raped a woman. The method used to accomplish the rape was described, and she was also informed that money had

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been taken from a wallet in the living room, that a flashlight had been dropped and later recovered, and other facts which could only have been known by the individual who had committed the rape (Tr.90-92).

At the conclusion of the State's case, appellant elected not to put on evidence (Tr.175-177). Prior to trial, however, appellant had duly filed a notice of his intention to claim the defense of alibi. In this notice, he indicated that at the time of the rape of Deana English he was at his residence with his mother, and had been there from 11:30 p.m. on February 18, 1979, until the following morning. Catherine Workman, appellant's mother, was listed as his alibi witness (R.48). Mrs. Workman was subpoenaed by the State and was available at trial to so testify.

On October 18, 1979, appellant duly filed a motion for disclosure of exculpatory material (R.50). Pursuant to this motion, on November 19, 1979, the State informed the appellant of the following:

1. That Kevin McClosky from the Center for Human Toxicology had submitted a report which indicated that the hair found in the bedsheets and pillow cases of the victim was different from the hair taken from appellant's head. A copy of the McClosky report was given to appellant's counsel at that time.

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2. That dirt taken from the clothing that appellant said he was wearing at the time of the incident was not similar to the dirt taken from the victim's residence.

3. That Mrs. Workman had called the Salt Lake County Sheriff's Office and had reported that appellant had been robbed in the parking lot of Devereaux's Bar and that during the robbery his wallet had been taken (R.58,59).

On May 8, 1979, a preliminary hearing was held before the Honorable Robert Gibson, Circuit Court Judge. At this hearing appellant called Virgil Johnson, the Deputy Salt Lake County Sheriff assigned to the investigation of this case. During the questioning of Detective Johnson, the appellant learned that Connie Riley would be called to testify at trial (Preliminary Hearing Transcript, 77). Appellant's counsel at the hearing was informed that appellant admitted entering the victim's apartment, taking money, and leaving his wallet in the apartment. He was not told of the circumstances surrounding the rape itself (Preliminary Hearing Transcript, 78). During the questioning of Detective Johnson, appellant was also informed of the following facts concerning the case:

1. That the victim indicated that the assailant possibly had a beard.

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2. The results of the analysis of the hair taken by Kevin McClosky.

3. That a second analysis had been made of the hair samples by Peter Barnett of Forensic Science Associates which indicated the hair to be similar to appellant's hair.

4. That soil samples were taken from the victim's residence and appellant's residence, that these soil samples were compared with soil taken from appellant's clothing, and that the results showed that the soil from appellant's clothing was similar to soil taken from his own residence.

5. That a timed run had been made between the victim's residence and the appellant's residence.

6. That the first telephone call received by the Sheriff's Office from Mrs. Workman reporting the theft of appellant's wallet was received at 1:14 a.m. on February 19, 1979.

7. All physical evidence from the scene which included a tank top and a piece of paper with the defendant's telephone number on it (Preliminary Hearing Transcript, 59-77).

Several weeks prior to trial, appellant's trial counsel, Robert Van Sciver, and Deputy County Attorney Lynn Payne, who prosecuted the case at trial, had a casual conversation in the halls of the courts building. To the

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best recollection of Mr. Payne, Mr. Van Sciver asked if he (Mr. Van Sciver)"knew everything," and Mr. Payne told him that he did know everything.

ARGUMENT

POINT I

APPELLANT WAS NOT DENIED DUE PROCESS BY THE FAILURE OF THE PROSECUTION TO DISCLOSE APPELLANT'S INCULPATORY STATEMENTS; THEREFORE, THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR A MISTRIAL.

The law on the subject of when the withholding of evidence by the prosecution denies a defendant due process of law has been set down by the United States Supreme Court, which has enunciated the standard for determining whether there has been a violation of due process in a state's criminal prosecution. In the seminal case of Brady v. Maryland, 373 U.S. 83 (1963), the defendant, prior to trial, had requested the prosecution to allow him to examine a co-defendant's extrajudicial statements. Several statements were shown to the defendant, but one, in which the co-defendant admitted the actual killing, was withheld by the prosecution and did not come to the attention of the defense until after trial and after appeal. The Supreme Court established in Brady the basic principle that suppression of material evidence by the prosecution which is favorable to an accused upon request violates due process.

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This Court, in State v. Jarrell, Utah, 608 P.2d 218 (1980), described the holding of the United States Supreme Court in Brady as follows:

> . . . the [United States Supreme] Court held that the prosecutorial suppression of evidence favorable to the accused, in the face of a specific request for the evidence, violates due process if the evidence is material either to guilt or to punishment.

608 P.2d at 224 (emphasis added). Central to a finding of violation of due process in a case of prosecutorial suppression of evidence under Brady, then, is the favorable nature of the evidence to the accused.

In a more recent case, Moore v. Illinois, 408 U.S. 786 (1972), reh. den. 409 U.S. 897 (1972), the Supreme Court reviewed the important elements of Brady and stated:

> The heart of the holding in Brady is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important then, are a) suppression by the prosecution after a request by the defense, b) the evidence's favorable character for the defense, and c) the materiality of the evidence. These are the standards by which the prosecution's conduct in Moore's case is to be measured.

408 U.S. at 794, 795 (emphasis added).

The case of United States v. Agurs, 427 U.S. 97 (1976) extended the rulings of the Supreme Court in Brady and Moore. In Agurs, the Court held that a prosecutor has a constitutional duty to volunteer obviously exculpatory evidence

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and evidence that is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce to the defense that which is unknown and unrequested by the defense. The Supreme Court held that due process is violated if the undisclosed evidence would have, if disclosed, created a reasonable doubt as to defendant's guilt. The Agurs Court further determined that whether the evidence created a reasonable doubt must be evaluated in light of the entire record as viewed by an appellate court. The proper standard of materiality of the undisclosed evidence established by the Supreme Court in Agurs is that if the omitted evidence creates a reasonable doubt of guilt that did not otherwise exist, constitutional error has been committed if it is suppressed. Finally, if ". . . there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial." 427 U.S. at 112, 113. Therefore, undisclosed evidence, to be considered material and to thereby come within the ambit of Brady, Moore, and Agurs, must be exculpatory. Appellant's undisclosed statements were inculpatory and the fact of their nondisclosure did not constitute a violation of due process under the standards set forth by the United States Supreme Court, particularly in the absence of a showing that the suppressed evidence was favorable to the accused.

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This Court, in State v. Jarrell, supra, was confronted with the issue of suppression of evidence by the prosecution. In Jarrell, the defendant's contention was that two police reports withheld by the prosecution contained information which would have tended to execulpate him; allegedly, the reports would have been helpful for both impeachment and cross-examination purposes. The defendant in Jarrell claimed that he did not become aware of the existence of the police reports until after the trial, in spite of the fact that both officers specifically referred to the reports during their testimony. This Court rejected the defendant's contention that the prosecution's nondisclosure of the police investigative reports required that the defendant be granted a new trial.

Appellant characterizes this Court's decision in Jarrell as resting most heavily on the fact of the absence of any indication that the defendant sought discovery of the police reports; appellant thereby leaves out the other central factor relied on by this Court, that the reports in question did not appear to raise a reasonable doubt as to the defendant's guilt. This Court held that not only is the prosecutor not required to disclose all evidence which might possibly be useful to the defense but which is not likely to have a forseeable effect on the verdict, but that generally, evidence has not been improperly withheld in a

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criminal proceeding if the defense has knowledge of such evidence and defense counsel simply fails to request it. Because the undisclosed inculpatory evidence in no way raised a reasonable doubt as to appellant's guilt, appellant's claim that he was deprived of a fair trial by the nondisclosure of his inculpatory statements suffers from the same fatal flaw inherent in State v. Jarrell, supra.

Several other Utah cases have recognized that to vitiate a conviction on suppression of evidence grounds, the evidence suppressed must have tended to clear the defendant and be exculpatory in nature; in other words, that the evidence, if not suppressed, must have tended to establish the defendant's innocence, and that it would have been helpful and not harmful to him if admitted at trial. Butt v. Graham, 6 Utah 2d 133, 307 P.2d 892 (1957); Ward v. Turner, 12 Utah 2d 310, 366 P.2d 72 (1961), cert. den. 371 U.S. 872 (1962).

In reviewing allegations of prosecutorial misconduct, this Court has stated: "Error will not be presumed nor can we presume misconduct on the part of counsel. . . ." State v. Cooper, 114 Utah 531, 201 P.2d 764 at 771 (1949). Moreover, this Court has repeatedly stated that great deference will be given to the judgment of the trial court. In State v. Hodges, 30 Utah 2d 367, 517 P.2d 1322 (1974), this Court

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> Due to his advantaged position and consistent with his responsibilties as the authority in charge of the trial, the inquiry is necessarily addressed to the sound discretion of the trial court . . . Inasmuch as this is his primary responsibility, when he has given due consideration and ruled upon the matter, this court on review should not upset his ruling unless it clearly appears that he has abused his discretion.

517 P.2d at 1324. This Court has in fact noted a presumption, in non-jury cases, that the trial judge disregards any improper material:

> The court, sitting without a jury, is presumed to have disregarded any irrelevant, immaterial or other evidence not pertinent to the issue.

State v. Burke, 102 Utah 249, 129 P.2d 560 (1942).

In the instant case, where Judge Baldwin denied appellant's motion for a mistrial, and where there is no showing that the undisclosed evidence was exculpatory and/or material, appellant was not denied due process, and this Court should not upset the trial court's denial of appellant's motion for a mistrial.

POINT II

APPELLANT WAS NOT PREJUDICED BY THE PROSECUTION'S FAILURE TO DISCLOSE APPELLANT'S INCULPATORY STATEMENTS AND WAS NOT THEREBY DENIED A FAIR TRIAL, PARTICULARLY WHERE HE HAD PERSONAL KNOWLEDGE CONCERNING THE ADMISSIONS.

In the case of State v. Moraine, 25 Utah 2d 51, 475 P.2d 831 (1970), the Utah Supreme Court held it was not error for the prosecuting attorney to fail to disclose in a bill

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of particulars admissions of the defendant concerning an armed robbery. In so doing the court seemed to indicate that the defendant could not claim surprise where he had personal knowledge concerning the admissions:

> Where the court orders the prosecuting attorney in a bill of particulars to give matters not required by the statute, the court may excuse the failure to furnish such material by permitting the evidence to be introduced, as was done in this case. Besides, if anyone knew about the statement, it surely was the defendant himself.

Id. at 833. For a similar result see State v. Adams, Utah, 583 P.2d 89 (1978), wherein the defendant was not informed of an admission made to a police officer:

> In regard to defendant's final point: That prejudicial error was committed because the prosecution did not disclose to him that it intended to use the testimony of Officer Reit concerning defendant's admission, this is to be said: We are in agreement with the proposition that the prosecution is under an obligation to treat the defendant fairly; and that it cannot willfully suppress evidence favorable to him for the purpose of obtaining evidence favorable to him for the purpose of obtaining a conviction. However, as will be seen from what has been said above, there was no abuse of that principle. The defendant and his counsel were aware of what had happened; and there was no suppression of evidence involved.

Id. at 91. In the case of State v. Cook, Kan., 589 P.2d 616 (1979), the court found that the trial judge did not commit error in refusing to dismiss a case where the prosecutor had failed to disclose exculpatory information. In doing so the court indicated:

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> Moreover evidence not disclosed to the defendant before trial is not suppressed or withheld by the state if the defendant has personal knowledge thereof, or if the facts become available to him during trial and he is not prejudiced in defending against these new facts. . . The test in these cases is whether the defendant's rights were prejudiced.

In King v. Oklahoma, Okla., 586 P.2d 756 (1978), cert. den. 440 U.S. 965 (1979), the prosecutor had told the defense counsel that a witness would not be able to identify the defendant. When the witness testified, she identified the defendant. In holding that it was not error to deny a motion for mistrial, the court said:

> As his first assignment of error, defendant alleges that the trial judge erred by refusing to grant defendant's motion for mistrial when Alice Lane identified the defendant in court as one of the burglars. Defendant asserts that the prosecution had, in answer to his question as to whether there would be an in court identification, assured him there would be none and that the resulting identification was, therefore, surprise; and as a result counsel for the defense was unprepared to counteract the prejudicial effect of the identification, thus severely impeding defense counsel in representing defendant. . . Although the positive identification at trial by Alice Lane was an unexpected occurrence to defense counsel, we do not deem such to come within the definition of surprise. Witness Lane was endorsed upon the information, thus giving counsel notice that she would be testifying against the defendant. It was counsel's responsibility to interview the witnesses endorsed upon the information and to discern the nature and extent of their testimony. Over three months' time from the date of the preliminary hearing until the date of trial was available to counsel to discover the testimony of Alice Lane.

Id. at 958.

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The appellant has claimed that the failure of Detective Johnson and the prosecutor to inform him of incriminating evidence was so prejudicial that appellant's trial counsel was competely unprepared to discredit the witness or rebut her testimony (Appellant's Brief, p. 16). A review of the record in this matter reveals nothing could be further from the truth. The appellant was aware of substantiall all of the evidence presented at trial from the date of the preliminary hearing (May 8, 1979). At that time he knew or should have known that the only issue at trial would be the identity of the rapist. He knew that the state's evidence would include the fact that the wallet of the appellant was found at the scene of the rape, that a piece of paper was found at the scene of the rape which had the appellant's telephone number on it, and that appellant had admitted to Connie Riley that he had been in the apartment of the victim at the time of the rape. At preliminary hearing he also knew that scientific tests had been taken on soil samples taken from the victim's residence and from the appellant's residence and that the appellant's hair had been compared with hair left at the scene. He knew the names of the persons who conducted these tests and the results of each test; some of which were favorable to the accused. He also knew that a report was made that his wallet had been taken

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from him in a robbery, which alleged theft was reported by the appellant's mother some 10 to 15 minutes after the assailant left Deana English's apartment.

The record clearly reflects that the appellant was aware of virtually all of the evidence that was presented at trial some seven months in advance. Very few defendants have been so fully aware of the evidence prior to trial.

This Court, in State v. Anderson, 612 P.2d 778 (1980), made several observations about preliminary hearings that are relevant to this case:

(1) That the prosecution is not required to introduce enough evidence to establish the defendant's guilt beyond a reasonable doubt, but must present a quantum of evidence sufficient to warrant submission of the case to the trier of fact.

(2) That the fundamental purpose served by the preliminary examination is to ferret out groundless and improvident prosecutions.

(3) That the ancillary purposes of effectively advising the defendant of the nature of the State's case against him and of providing a discovery device in which the defendant is able to discover and preserve favorable evidence are also provided by the preliminary examination.

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Respondent submits that the prosecution established sufficient evidence to warrant submission of the case to the trial of fact, that the prosecution's case was neither groundless nor improvident, appellant was provided through the preliminary hearing with a discovery device enabling him to discover and preserve favorable evidence, and that he was informed at the preliminary hearing of the nature of the State's case against him (see analysis, supra).

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In effect, the appellant has contended that he could not effectively deal with these disclosures because he was surprised. The case law in Utah has consistently been that the defense cannot claim surprise from newly discovered evidence where reasonable diligence would have dislosed the information. State v. Hawkins, 81 Utah 16, 16 P.2d 713 (1932); State v. Weaver, 78 Utah 555, 6 P.2d 167 (1931). In addition, this Court has recently determined, in Anderson v. Bradley, Utah, 590 P.2d 339 (1979) that surprise, as grounds for a new trial, is only that which ordinary prudence could not have guarded against. In this case appellant's trial counsel had more than seven months to investigate after he became aware of the fact that the appellant had admitted to being in the victim's apartment. He was aware of all of the witnesses to the conversation wherein defendant admitted to being in the apartment. All of the witnesses were available to be questioned prior to trial. Two of the witnesses (the appellant and Mrs. Workman) were certainly sympathetic to the appellant. Certainly it was the obligation of appellant's trial counsel to question those witnesses as to the entire conversation. He apparently failed to do so. Now he cannot complain that he did not find what he clearly could have found had he taken reasonable steps to investigate.

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Additionally, prior knowledge of the appellant's admission would not have put appellant in any better position with respect to confronting the evidence presented. The testimony was that appellant had admitted a rape. Three witnesses, appellant, his brother, and his mother were parties to telephone conversations with Mrs. Riley wherein the rape was discussed. Appellant's counsel could easily have tested whether Mrs. Riley was telling the truth, since the conversations either occurred as Mrs. Riley testified or they did not. All that appellant's trial counsel would have had to do would have been to call appellant's mother, and ask her whether she had had a conversation with Mrs. Riley in which she (Mrs. Workman) told Mrs. Riley that appellant had raped a woman. Certainly appellant's mother could testify as to whether she had ever made such a statement about her son, and the evidence as presented could thereby have been effectively dealt with.

The record in this case shows clearly that appellant had knowledge of the fact that the state would introduce evidence that Mrs. Riley talked to appellant within hours of the rape. Appellant knew that she would place him inside the residence at the time of the rape. Appellant had access to at least two witnesses to that conversation, and his failure to discover the entire conversation cannot be excused.

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In addition, appellant at trial had all the witnesses available to him that were needed to deal effectively with the admission. Prior knowledge of the admission would not have put appellant in any better position with regard to confronting the evidence presented. It cannot be alleged that appellant's trial counsel could not effectively deal with the testimony presented at trial by Mrs. Riley as to appellant's confession. Appellant not only had an effective way to deal with this evidence, but he also had other evidence available to him such as the alibi witness, the hair and soil samples, and the reported robbery of the wallet, which he chose not to present. The decision not to put on his defense was a calculated choice designed to gain sympathy for appellant's position that he was denied his defense.

POINT III

APPELLANT MAY NOT AVAIL HIMSELF OF THE BENEFIT OF CASE LAW DEALING WITH PROSECUTORIAL USE OF KNOWN FALSE TESTIMONY AT TRIAL, OR WITH THE APPLICATION OF THE DISCOVERY RULES OF RULE 16(a), FEDERAL RULES OF CRIMINAL PROCEDURE BECAUSE OF THE INAPPLICABILITY OF THESE MATTERS TO THE FACTS OF THE INSTANT CASE.

Appellant characterizes the testimony of Detective Johnson, given at the preliminary hearing, as false testimony in that it did not allude to the circumstances of the rape

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itself. Respondent contends that this testimony is, at most, incomplete, and does not reach the level of false testimony. Instructive in this regard is the case of Bronston v. United States, 409 U.S. 352 (1973), in which the United States Supreme Court determined that the federal perjury statute, 18 U.S.C. § 1621, did not reach a witness' answer that was literally true, but unresponsive, even assuming that the witness intends to mislead the questioner by his answer, and even assuming the answer is arguably false by negative implication. The Court determined that any special problems arising from the literally true but unresponsive answer are to be remedied not through a federal perjury prosecution but through the questioner's acuity. The Court stated:

> Under the pressures and tensions of interrogation, it is not uncommon for the most earnest witness to give answers that are not entirely responsive. Sometimes the witness does not understand the question, or may in an excess of caution or apprehension read too much or too little into it . . . It is the responsibility of the lawyer to probe; testimonial interrogation, and cross-examination in particular, is a probing, prying, pressing form of inquiry. 409 U.S. at 358.

Is also instructive that a vast majority of courts which have considered the question have held that perjury or false swearing cannot be based on a reply which, although

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incomplete, misleading, or unresponsive, is literally true or technically accurate. This rule is said to apply even if the person who made the statement withheld purposely part of the truth concerning the matter asked, or if for devious reasons the statement was intentionally misleading, or was shrewdly evasive, thereby conveying false information by implication. 69 ALR 3d 993 (1976).

In the case of In re Rosoto, 112 Cal.Rptr. 641, 519 P.2d 1065 (1974) cert. den. 419 U.S. 897 (1974), the California Supreme Court held that where a witness' answers (in this case the witness was the chief investigator of the district attorney) which are literally true may cause a misleading impression due to the failure of counsel to ask more specific questions, the witness may not be faulted for failing to volunteer more explicit information, and the witness' failure to volunteer testimony to avoid the misleading impression does not constitute perjury, because the crucial element of falsity is not present in his testimony.

Detective Johnson's answer to the question of appellant's counsel was literally true, and contained no element of falsity. Further, appellant's trial counsel knew that his client was charged with rape. It would have been a simple matter for him to follow up his question to Detective Johnson with another question as to whether appellant had

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admitted the rape to Mrs. Riley. Appellant himself knew what his statement to Mrs. Riley entailed. He may not now, at this late date, attempt to avail himself of those cases dealing with deliberate deception of court and jury by the prosecution through the knowing presentation of false testimony, where there is no showing of the presentation by the prosecution of known false testimony. A brief summary of the principal cases cited by appellant in this regard shows that they are inapposite to the instant matter.

In Mooney v. Holohan, 294 U.S. 103 (1935) a habeas corpus petitioner charged that the State of California held him in confinement without due process of law. He alleged that the sole basis of his conviction was perjured testimony, knowingly used by the prosecution to obtain his conviction. He also alleged that the prosecuting authorities deliberately suppressed evidence which would have impeached and refuted the testimony given against him (i.e. exculpatory evidence). The Supreme Court held that due process cannot be deemed satisfied if a state has contrived a conviction through the pretense of a trial which is used as a means of depriving a defendant of liberty through a deliberate deception of a court and jury by the presentation of testimony known to be

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perjured. The facts in Mooney are easily distinguished from those of the instant case. Here, there was no perjured testimony presented by the prosecution either at the preliminary hearing or at trial. The information allegedly suppressed was inculpatory in nature, and, at trial there was no suppression of any evidence whatsoever by the prosecution.

In Napue v. Illinois, 360 U.S. 264 (1959), the Supreme Court determined that a conviction obtained through the use of false evidence, known to be such by representatives of the State is invalid under the Fourteenth Amendment, and that the same result obtains when the State, not having solicited false evidence, allows it to go uncorrected when it appears. In the instant case, there was no false evidence presented by the prosecution, therefore the prosecution was not guilty of allowing false evidence to go uncorrected.

In Giglio v. United States, 405 U.S. 150 (1972), the defense counsel discovered subsequent to trial that the Government at trial failed to disclose an alleged promise of leniency made to its key witness in return for his testimony. The Assistant United States Attorney who presented the case to the grand jury admitted that he promised the witness that he (the witness) would not be prosecuted if he testified before the grand jury and at trial. The Assistant Attorney General who tried the case was unaware of the

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promise. At trial, the informant flatly denied the existence of any such agreement. The Court held that the prosecution's duty to present all material evidence to the jury was not fulfilled by the nondisclosure, and that therefore due process was violated. In the instant case, there was no false testimony given either at the preliminary hearing or at the trial, therefore Giglio is completely distinguishable on its facts from the instant matter.

Appellant's attempted reliance on the case of United States v. Pascual, 606 F.2d 561 (5th Cir. 1979) is also inappropriate, particularly in light of the facts of the instant case. In Pascual, the Federal Rules of Criminal Procedure, in particular Rule 16(a), were operative and applicable; in the instant matter they were not. The magistrate in Pascual entered a standing discovery order; in appellant's case, no standing discovery order was entered. Finally, the decision in Pascual was dependent not only on the fact of non-disclosure of the defendant's letter in violation of Rule 16(a), but also on the fact that defendant's letter incriminated two co-defendants by name where nothing in the record showed that they had knowledge of the letter prior to its presentation at trial. Appellant knew of his own statement, and it affected only himself.

In United States v. Pollack, 534 F.2d 964 (D.C. Cir. 1976) cert. den. 429 U.S. 924 (1976), the Court of Appeals

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for the District of Columbia had occasion to interpret pertinent provisions of Rule 16(a). The court determined that under rule 16(a), which allows defendants to inspect and copy or photograph any relevant written or recorded statements or confessions made "by the defendant" within the possession, custody or control of the Government, the phrase "by the defendant" requires not that the statement at issue be attributed to the defendant, but that the statement be obtained by the Government directly from the defendant without intervention of any third party. Under this interpretation, even if Rule 16(a) were applicable in the instant matter, appellant's undisclosed confession would not fall under its protection, as his statement was not obtained by the state directly from him, but was obtained through Mrs. Riley.

The case of State v. Hiteshaw, Ore., 476 P.2d 935 (1970), is also inapplicable to the instant case, particularly because in Hiteshaw not only was there a written discovery order requiring the state to explicitly disclose the defendant's admissions, but there was also evidence of trickery on the part of police officers in getting the admissions from the defendant to convict him. Here, there was no written discovery order, nor was there any misconduct in getting the appellant's confession.

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Finally, petitioner's reliance on State v. Brown, Idaho, 560 P.2d 880 (1977) is misplaced, in light of the recent decision of the Idaho Supreme Court in State v. Horn, Idaho, 610 P.2d 551 (1980) that the prosecutor is only required to disclose information favorable to the defendant and material to either defendant's guilt or punishment in a criminal prosecution.

CONCLUSION

Appellant made no showing that he was prejudiced by the alleged failure of the prosecution to disclose his confession under standards enunciated by the United States Supreme Court and by this Court, due process is not violated by the failure of the prosecution to disclose a defendant's inculpatory statements, particularly where the defendant has personal knowledge of the statements and is not prejudiced thereby.

For these reasons, respondent prays that this Court affirm the conviction of appellant.

Respectfully submitted,

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CERTIFICATE OF MAILING

Mailed a copy of the foregoing Brief of Respondent to Walter F. Bugden, Jr., Attorney for Appellant, Salt Lake Legal Defender Association, 333 South Second East, Salt Lake City, Utah 84111, this 6th day of April, 1981.

Robert N. Parrish

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