NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

ANDREA KIDDER, Petitioner, v. STATE OF FLORIDA, Respondent.	)	Case No. 2D12-3535

Opinion filed June 12, 2013.

Petition for Writ of Certiorari to the Circuit Court for Collier County; Frederick R. Hardt, Judge.

Keith W. Upson of The Upson Law Group, P.L., Fort Myers, for Petitioner.

Sonya Rudenstine, Gainesville; James T. Miller, Jacksonville; and Michael Ufferman, Tallahassee, for Amicus Curiae Florida Association of Criminal Defense Lawyers.

Pamela Jo Bondi, Attorney General, Tallahassee, and Jonathan P. Hurley, Assistant Attorney General, Tampa, for Respondent.

CASANUEVA, Judge.

Andrea Kidder petitions this court for a writ of certiorari seeking to quash a discovery order that required her to disclose the results of a blood alcohol test. Because she was required to disclose the results of this scientific test pursuant to Florida Rule of Criminal Procedure 3.220(d)(1)(B)(ii), the discovery order did not depart from the essential requirements of law and the petition is therefore denied.

I. FACTS AND PROCEDURAL HISTORY

In November 2009, Ms. Kidder was involved in an automobile accident which resulted in the death of Bree Kelly.[1] At the request of the Florida Highway Patrol, emergency medical service personnel obtained two blood samples from Ms. Kidder. The Florida Department of Law Enforcement (FDLE) analyzed one sample and determined that the alcohol content was 0.196 percent.

Ms. Kidder was thereafter charged by information with DUI manslaughter and vehicular homicide, and she elected to participate in pretrial discovery pursuant to rule 3.220(a). Ms. Kidder filed a motion to require FDLE to send the second blood sample to Wuesthoft Toxicology Laboratory to have the sample analyzed to determine its alcohol content. The trial court granted this motion and the second blood sample was sent to Wuesthoft for testing.

Thereafter the State moved to compel Ms. Kidder to provide it with the results of Wuesthoft's blood alcohol analysis pursuant to the reciprocal discovery provisions of rule 3.220(d)(1)(B)(ii). It argued that the rule requires a defendant, who

[1]Because this case is being reviewed by this court via a certiorari proceeding, we do not have a full record on appeal and must rely on the appendix to the petition.

has elected to participate in discovery, to disclose the results of scientific tests. The State further argued that the results of the scientific test did not meet the definition of work product as defined by rule 3.220(g)(1).

In opposition, Ms. Kidder asserted that the results of Wuesthoft's testing were protected work product and that compelling disclosure of the report would contravene the Fifth and Sixth Amendments to the United States Constitution. Ms. Kidder asserted that she did not intend to use the report at trial.

The trial court entered its order compelling Ms. Kidder to provide the State with a copy of Wuesthoft's report. We note that the report at issue is not included in the appendix and the transcript of the motion hearing does not indicate that the trial court viewed the report in camera or otherwise. However, Ms. Kidder does not assert that Wuesthoft's report contains the opinions, theories, or conclusions of her attorney or members of the attorney's legal staff.

II. ANALYSIS

A. Certiorari Review

"A petition for writ of certiorari is appropriate to review a discovery order when the order departs from the essential requirements of law, causing material injury throughout the remainder of the proceedings below and effectively leaving no adequate remedy on appeal." Nussbaumer v. State, 882 So. 2d 1067, 1071 (Fla. 2d DCA 2004). The last two requirements of this test are jurisdictional. Barker v. Barker, 909 So. 2d 333, 336 (Fla. 2d DCA 2005).

We agree that discovery of information that could be considered work product may cause such irreparable injury if disclosed. Allstate Ins. Co. v. Langston,

655 So. 2d 91, 94 (Fla. 1995). However, as discussed below, the Wuesthoft report does not contain work product.

B. Florida Rule of Criminal Procedure 3.220

Participation in the discovery process is not mandatory for a criminal defendant: "a defendant may elect to participate in the discovery process provided by these rules . . . ." Fla. R. Crim. P. 3.220(a). Once this election occurs, it "triggers a reciprocal discovery obligation for the defendant" and both the prosecution and defendant are then bound "to all discovery procedures contained in these rules." Id.

The defendant's reciprocal discovery obligation pertinent to the case at bar is set forth in rule 3.220(d)(1)(B)(ii) and requires a defendant to disclose and permit the inspection and copying of "reports or statements of experts made in connection with the particular case, including results of . . . scientific tests, experiments, or comparisons." See Abdool v. State, 53 So. 3d 208, 219-20 (Fla. 2010) (applying rule 3.220(d)(1)(B)(ii) to penalty phase proceedings and holding that appellant was required to provide the State with raw data from his mental health expert). Based on the plain language of rule 3.220(d)(1)(B)(ii), Ms. Kidder was required to disclose to the State the results of the scientific test Wuesthoft conducted on the blood sample.

Ms. Kidder urges this court to interpret rule 3.220(d)(1)(B)(ii) to require disclosure of a scientific test only when a defendant intends to call the expert who conducted the test as a witness. We believe that this interpretation would be contrary to the plain language of the rule. See Scipio v. State, 928 So. 2d 1138, 1144 (Fla. 2006) ("Because full and fair discovery is essential to these important goals, we have repeatedly emphasized not only compliance with the technical provisions of the

discovery rules, but also adherence to the purpose and spirit of those rules in both the criminal and civil context.").

> Rule 3.220(d) provides as follows:
>
> Defendant's Obligation.
>
> (1) If a defendant elects to participate in discovery, either through filing the appropriate notice or by participating in any discovery process, including the taking of a discovery deposition, the following disclosures shall be made:
>
> (A) Within 15 days after receipt by the defendant of the Discovery Exhibit furnished by the prosecutor pursuant to subdivision (b)(1)(A) of this rule, the defendant shall furnish to the prosecutor a written list of the names and addresses of all witnesses *whom the defendant expects to call as witnesses at the trial or hearing*. When the prosecutor subpoenas a witness whose name has been furnished by the defendant, except for trial subpoenas, the rules applicable to the taking of depositions shall apply.
>
> (B) Within 15 days after receipt of the prosecutor's Discovery Exhibit the defendant shall serve a written Discovery Exhibit which shall disclose to and permit the prosecutor to inspect, copy, test, and photograph the following information and material that is in the defendant's possession or control:
>
> (i) the statement of any person listed in subdivision (d)(1)(A), other than that of the defendant;
>
> (ii) reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons; and
>
> (iii) any tangible papers or objects *that the defendant intends to use in the hearing or trial*.

(Emphasis added.)

Subsection (d)(1)(B)(i), by referencing subsection (d)(1)(A), requires a defendant to provide the State with the statements of any person the defendant plans to

call as a witness. Subsection (d)(1)(B)(iii) also specifically states that a defendant must provide to the State any tangible papers or objects that the defendant intends to use in a hearing or trial. Conversely, subsection (d)(1)(B)(ii) does not restrict the disclosure of reports of experts to only those experts a defendant plans to call as a witness. We conclude that the rule is clear and unambiguous in requiring a defendant to disclose the results of a scientific test like the one at issue in the present case, regardless of whether the defendant anticipates calling the person who conducted the test as a witness. See Weston TC LLLP v. CNDP Mktg. Inc., 66 So. 3d 370, 375 (Fla. 4th DCA 2011) ("When a rule is clear and unambiguous, courts will not look behind the rule's plain language or resort to rules of construction to ascertain intent.").[2]

C. Work Product

1. Federal and Civil Cases Involving Work Product

The Supreme Court first recognized the work product doctrine in a civil case, Hickman v. Taylor, 329 U.S. 495, 508 (1947), where the petitioner sought discovery of written and oral statements of witnesses in the respondent's files, even though the identity of those witnesses was well known and their availability to the petitioner was unimpaired. The Court held that the petitioner's attempt "to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties" without a showing of

[2]We note that, in comparison, Federal Rule of Criminal Procedure 16(b)(1)(B) specifically requires a defendant to disclose the results of any scientific test or experiment only if "(i) the item is within the defendant's possession, custody, or control; and (ii) the defendant intends to use the item in the defendant's case-in-chief at trial, or intends to call the witness who prepared the report and the report relates to the witness's testimony."

necessity or justification, fell outside the area of proper discovery and "contravenes the public policy underlying the orderly prosecution and defense of legal claims." Id. at 510.

Several years later in United States v. Nobles, 422 U.S. 225, 238 (1975), the Supreme Court discussed the application of the work product doctrine in criminal cases, explaining that "[t]he interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case."

> At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case. But the doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself.

Id. at 238-39.

Florida recognizes two forms of work product: opinion work product and fact work product. "Fact work product traditionally protects that information which relates to the case and is gathered in anticipation of litigation." S. Bell Tel. & Tel. Co. v. Deason, 632 So. 2d 1377, 1384 (Fla. 1994) (citing State v. Rabin, 495 So. 2d 257 (Fla. 3d DCA 1986)). In comparison, opinion work product "consists primarily of the attorney's mental impressions, conclusions, opinions, and theories." Id.

The distinction between the two forms of work product becomes important when disclosure is sought. Fact work product can be discovered upon a determination by an opposing party of need and undue hardship. Id. Conversely, "opinion work product generally remains protected from disclosure." Id.

2. Opinion Work Product Defined by Rule 3.220

Rule 3.220 specifically defines and excludes from discovery certain materials in criminal cases. Rule 3.220(g)(1) states that the following matters are not subject to disclosure: "*Work Product*. Disclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the prosecuting or defense attorney or members of their legal staffs." This rule specifically describes opinion work product and excludes it from discovery in criminal cases. See id.

In Smith v. State, 873 So. 2d 585, 587-88 (Fla. 3d DCA 2004), the court found that the provisions of rule 3.220(g)(1) sheltered a twenty-two page psycho-social report and addendum "prepared by defense counsel with the assistance of other members of the defense team, that is in narrative form and is based on medical records, witness interviews, and mental health evaluations." The report contained "a summary of witness statements, italicizing certain portions, which unavoidably combined a selection process achieved through an interpretative filter that emphasized certain information over other, thus disclosing counsel's opinions and strategy." 873 So. 2d at 588.

We conclude that the lab report containing the results of the scientific test Wuesthoft conducted on the blood sample does not meet the definition of work product in rule 3.220(g)(1).[3] The scientific report at issue was generated by Wuesthoft Toxicology Laboratory, not by defense counsel, and Ms. Kidder does not allege that the

[3]It does not appear that Ms. Kidder requested the trial court to conduct an in camera review of the toxicology report.

report contains the opinions, theories, or conclusions of her attorney or members of her attorney's legal staff. See Bailey v. State, 100 So. 3d 213, 217 (Fla. 3d DCA 2012) (rejecting appellant's contention that raw data from the mental health expert who appellant intended to call as witnesses was work product).

3. Fact Work Product

Although rule 3.220 only includes in its definition of work product information that is typically considered opinion work product, it does address fact work product in two previously noted subsections. Subsection 3.220 (d)(1)(B)(i) provides that a defendant must provide in discovery the statements of a person only if the defendant plans to call that person as a witness. Further, subsection 3.220(d)(1)(B)(iii) requires a defendant to provide tangible papers or objects only where the defendant intends to use such in a hearing or trial.

Conversely, subsection 3.220(d)(1)(B)(ii) specifically states that a defendant is required to disclose to the State a report of an expert, including results of scientific tests. This subsection does not require that the defendant anticipate calling the expert as a witness nor does it require the State to establish that it cannot obtain the information by any other means.[4] The Supreme Court of Florida in Abdool, 53 So. 3d at 219-20, held that the appellant was required to disclose to the State raw data relied upon by the appellant's mental health expert. After determining that rule 3.220 applies in capital cases both in the guilt phase and the penalty phase, the court noted " 'rule

[4]By contrast, Florida Rule of Civil Procedure 1.280(b)(5)(B) specifically provides that a party may only discover facts that are known to an expert hired in preparation for trial but who is not expected to be called as a witness at trial, only after demonstrating exceptional circumstances which make it impracticable to obtain such facts by other means.

3.220 spells out very specific discovery obligations by both sides when the defendant elects to participate in discovery.' " Id. at 219-20 (quoting Kearse v. State, 770 So. 2d 1119, 1127 (Fla. 2000)).

Although here we are not in the context of the penalty phase of a death eligible case, this case is similar in the material sought to be disclosed. In both instances, the reciprocal discovery process requires the disclosure of the data, and Abdool supports the trial court's order to disclose. See Bailey, 100 So. 3d 213. Therefore, in the context of criminal proceedings, blood test results are not protected by a general claim of work product privilege.

We are not persuaded by the cases Ms. Kidder cites from other jurisdictions. In People v. Spiezer, 735 N.E.2d 1017, 1028 (Ill. App. Ct. 2000), the court interpreted a criminal discovery rule similar to Florida's but concluded that it did "not believe that the drafters" of the rule specifically intended to exclude reports of nontestifying, consulting experts from the work product doctrine. United States v. Walker, 910 F. Supp. 861, 863 (N.D.N.Y. 1995), involved the admissibility, not the discoverability, of evidence the government wished to present at trial from experts retained by the appellee who the appellee did not plan to call as witnesses and who were cumulative of the government's experts. In State v. Mingo, 392 A.2d 590, 592 (N.J. 1978), the court found that the State did not have a justification for calling the appellee's handwriting expert as a witness at trial where it was capable of obtaining its own expert.

D. Fifth Amendment

Ms. Kidder also asserts that the disclosure of the blood alcohol report violates the protection afforded her by the Fifth Amendment's privilege against self-incrimination. We disagree. The privilege is personal to the accused and does not apply to the chemist who conducted the blood alcohol analysis. See Nobles, 422 U.S. at 233-34 (holding that "disclosure of the relevant portions of the defense investigator's report would not impinge on the fundamental values protected by the Fifth Amendment"); Parkin v. State, 238 So. 2d 817, 820 (Fla. 1970) ("The constitutional privilege against self-incrimination in history and principle seems to relate to protecting the accused from the process of extracting from his own lips against his will an admission of guilt.").

E. Sixth Amendment

Ms. Kidder further contends that compelling a defendant to provide the results of a scientific test performed by an expert who is not expected to testify would hinder the defendant's trial preparation and therefore his or her right to the effective assistance of counsel afforded by the Sixth Amendment. She contends that whenever it is necessary for a defense attorney to seek an independent scientific test as part of the attorney's preparation for trial, the attorney possibly will be creating an unfavorable witness. We do not find merit in this argument because an accused is under no obligation and correspondingly has no constitutional right to participate in the discovery process.

Ms. Kidder is correct that the Sixth Amendment to the United States Constitution provides an accused in every criminal prosecution the right to the assistance of counsel, which is intended "to ensure a fair trial." Strickland v.

Washington, 466 U.S. 668, 686 (1984). To that end, the attorney has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Id. at 688.

Furthermore, the State has the duty to provide a defendant with favorable evidence upon request where the evidence is material to guilt and the failure of the State to do so violates the defendant's due process rights. Brady v. Maryland, 373 U.S. 83, 87 (1963). However, the Supreme Court has held that "[t]here is no general constitutional right to discovery in a criminal case, and Brady did not create one; . . . 'the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded. . . .' " Weatherford v. Bursey, 429 U.S. 545, 559 (1977) (quoting Wardius v. Oregon, 412 U.S. 470, 474 (1973)); see generally Taylor v. Illinois, 484 U.S. 400, 415 (1988) (holding that the exclusion of a defense witness's testimony as a sanction for a discovery violation did not violate the Compulsory Process Clause of the Sixth Amendment).

Florida has provided a procedure to engage in criminal pretrial discovery, and Ms. Kidder could have elected not to participate in the discovery process. See Fla. R. Crim. P. 3.220(a). By electing to participate in the discovery process, Ms. Kidder was able to obtain evidence in the State's possession, more than that required by Brady. The second blood sample was originally in the possession of the State and the State could have had both blood samples analyzed. Ms. Kidder had the State's evidence transferred to her for what her motion classified as an "independent analysis." Nowhere in Ms. Kidder's motion does she assert that the results of the laboratory test are for her sole use and protected from disclosure to the State. We fail to see how Ms.

Kidder's due process right to a fair trial has been impaired. See Commonwealth v. Paszko, 461 N.E.2d 222, 237 (Mass. 1984) (concluding that criminal procedure rules favoring liberal discovery serves a truth-enhancing purpose that outweigh "any resulting inconvenience or potential disincentive to lawyers who obtain and preserve such statements in written form").

Nevertheless, we recognize the decision of whether to engage in the discovery process may present defense counsel with a Hobson's choice. To elect to participate in discovery allows an accused, such as Ms. Kidder, the ability to view the State's evidence. In return, however, the State, as permitted by the discovery rule, is entitled to the same. While such an exchange may well promote a fair trial, for defense counsel charged with the duty to effectively assist the client, it may be difficult to reconcile the duty to defend with the duty to disclose. It is likely that the results of the second blood test will not aid Ms. Kidder but will aid the State. We can envision circumstances where counsel may not desire to engage in discovery under rule 3.220. However, the State's lab report, similar to Wuesthoft's lab report which Ms. Kidder argues should be unavailable to the State, was made available to defense counsel. Ms. Kidder "is not constitutionally entitled to a discovery system that operates only to [her] benefit." Paszko, 461 N.E.2d at 237.

III. CONCLUSION

Pursuant to rule 3.220(d)(1)(B)(ii), Ms. Kidder was required to disclose to the State the results of the scientific test Wuesthoft conducted on the blood sample, and consequently, the trial court's discovery order did not depart from the essential requirements of law. We add that this result should not be construed as permitting the

introduction of the results of the second blood test in the State's case-in-chief. Other issues may yet remain, including but not limited to whether such evidence is cumulative and whether it would constitute improper bolstering.

We deny Ms. Kidder's petition for writ of certiorari.

WALLACE, J., Concurs in the result with opinion.
ALTENBERND, J., Concurs with opinion

WALLACE, Judge, Concurring in the result.

The plain language of rule 3.220(d)(1)(B)(ii) supports the trial court's order requiring Ms. Kidder to provide the State with a copy of Wuesthoff's report concerning the results of the blood alcohol analysis. If Ms. Kidder had not elected to participate in reciprocal discovery under the rule, the entry of an order requiring the defense to disclose to the prosecution evidence that it did not intend to use at trial would likely violate Ms. Kidder's rights under the United States Constitution. See generally, Eric D. Blumenson, Constitutional Limitations on Prosecutorial Discovery, 18 Harv. C.R.-C.L. L. Rev. 123 (1983) (discussing the constitutional implications of discovery by the prosecution and the limitations on such discovery imposed by the United States Constitution); Robert P. Mosteller, Discovery Against the Defense: Tilting the Adversarial Balance, 74 Calif. L. Rev. 1567 (1986) (discussing limitations on discovery

by the prosecution against the defendant imposed by the Fifth and Sixth Amendments to the United States Constitution, attorney-client privilege, and the work product doctrine). However, as Judge Casanueva observes in his thoughtful opinion for the majority, Ms. Kidder had the option of electing not to participate in the discovery process. If Ms. Kidder had declined to participate in reciprocal discovery, she would not have been required to give the prosecution materials such as the results of Wuesthoff's blood alcohol analysis. Because the obligation to turn over the results of the test flowed solely from Ms. Kidder's voluntary election to obtain the advantages of receiving discovery from the prosecution, I concur in the result reached by the majority. I also agree that the results of Wuesthoff's blood alcohol analysis do not constitute work product that is protected from discovery under rule 3.220(g)(1).

The Supreme Court of Florida first adopted rules of criminal procedure that included provisions for reciprocal discovery in 1967. The new rules became effective on January 1, 1968. In re Florida Rules of Criminal Procedure, 196 So. 2d 124, 124 (Fla. 1967). Rule 1.220 addressed the subject of "DISCOVERY." Id. at 151-55. Under subsection (a) of this new rule, the defendant could obtain discovery from the State by motion. If the court required the prosecution to produce test results and reports and documents and other tangible objects for inspection, copying, and photographing, then the defendant had the obligation under subsection (c) of the new rule to disclose similar items to the prosecution:

> (c) Reciprocal Discovery.-If the court grants relief sought by the defendant under (a)(2), or (b) of this rule, it shall condition its order by requiring that the defendant permit the state to inspect, copy or photograph scientific or medical reports, books, papers, documents, or tangible

> objects which the defendant intends to produce at the trial and which are within his possession, custody, or control.

Id. at 151. Notably, the provisions of the new reciprocal discovery rule concerning the reports or statements of experts did not require the defendant to provide the prosecution with such materials unless the defendant intended to use them at trial.

In 1972, the Supreme Court of Florida made extensive amendments to the criminal rules. The changes became effective on February 1, 1973. In re Florida Rules of Criminal Procedure, 272 So. 2d 65, 65. (Fla. 1972). The amendments to the discovery rule eliminated the need for court intervention and made the reciprocal discovery provisions self-executing. Id. at 105-10. Under subsection 3.220(b)(4)(ii) of the 1972 rules, a defendant electing to participate in reciprocal discovery was required to disclose to the prosecution "[r]eports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons." Id. at 107. The 1972 amendment to the discovery rule deleted the limitation providing that the defendant was required to produce reports or statements of experts only if he or she intended to use such materials at trial. Neither the Supreme Court of Florida nor the Special Advisory Committee[5] addressed the reason for this major change in the extent of the defendant's obligation to provide reciprocal discovery to the prosecution. The absence of any comment on such a major change raises the question of whether it may have resulted from an oversight. Although the court has amended the reciprocal discovery rules several times since the 1972 revision, the defendant's obligation to provide reports and

[5]The Special Advisory Committee provided "Committee Notes" on the revision to the criminal rules of procedure.

statements of experts—without regard to whether the defense intends to use them at trial—has remained unchanged in the rule to the present.

In the forty years during which the reciprocal discovery rules have been in their current form, the Florida courts have disposed of millions of criminal cases.[6] It is remarkable that during this forty-year period, there has not been—until now—a single reported Florida case in which the State has sought the entry of an order requiring the defense to disclose to the prosecution the report or statement of an expert that the defendant did not intend to use at a hearing or in trial. Here, the significance of this fact lies not in what has happened but instead in what has not happened. Thus it is appropriate to ask why—over a forty-year period involving millions of criminal prosecutions—there has been no reported instance in Florida of an effort by the prosecution to obtain reports or statements of experts that the defendant does not intend to use at trial.

I suggest that there are three possible answers to this question. These explanations overlap; they are not mutually exclusive. First, it may be relatively easy for the defense to evade any obligation under the reciprocal discovery rule to disclose such materials to the prosecution. Defense counsel may request the expert to make any report of a "bad" result orally and to provide a written report only if the result is favorable to the defense. See, e.g., People v. Lamb, 40 Cal. Rptr. 3d 609, 612 (Cal. Ct. App. 2006) (noting a statement by a defense accident reconstruction expert "that written

[6]In fiscal year 2011-2012 alone, the Florida courts disposed of 990,159 criminal cases. This total includes 187,330 circuit court cases and 802,829 county court cases. See Fla. Office of the State Courts Adm'r, FY 2011-12 Statistical Reference Guide, 3-1 and 7-1, available at http://www.flcourts.org/gen_public/stats/reference_guide11_12.shtml and 18.2.3(a), 169-70.

reports are sometimes not prepared in order to avoid discovery"). Second, despite the plain language of rule 3.220(d)(1)(B)(ii), prosecutors, defense attorneys, and trial judges may share an assumption that a defendant's obligation to provide reciprocal discovery under the rule is limited to items that the defense intends to use at trial. Such an understanding would be consistent with Federal Rule of Criminal Procedure 16(b)(1)(B) (the comparable federal rule) and with Florida Rule of Civil Procedure 1.280(b)(5)(B). Third, under our accusatorial system of criminal justice, the defendant generally may not be compelled to assist the prosecution in proving his or her guilt. Instead, we have traditionally relied on "a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder[s] the entire load.' " Tehan v. United States ex rel. Shott, 382 U.S. 406, 415 (1966); cf. Blumenson, supra at 176-77 (discussing the extent to which the decision in Williams v. Florida, 399 U.S. 78 (1970), and rules authorizing prosecutorial discovery of the defense case have made inroads on the accusatorial system). These fundamental tenets of our criminal justice system are so ingrained in lawyers that they may engender a certain restraint that disinclines prosecutors from seeking the production of materials that the defense does not intend to use at trial.

Whatever the reason for the absence of any reported appellate opinions in Florida on this topic, the publication of the court's decision in this case is likely to change the legal landscape for both prosecutors and defense counsel. Prosecutors will now be encouraged to seek, and defense counsel may be obligated to disclose, the reports and statements of experts whether or not the defense intends to use them at

trial.[7] The decision in this case may provide the prosecution with a limited and short-term tactical advantage in Ms. Kidder's case.[8] However, I believe that our decision will have negative effects in the long term for the criminal defense bar, the State, and the courts.

The effect of our decision will be to confront defense counsel with a dilemma. In most instances, defense counsel will wish to participate in reciprocal discovery to obtain the names and addresses of the State's witnesses and to learn the nature of the State's evidence. Generally speaking, such information is essential to the effective representation of the client. Nevertheless, a decision made at the outset of the case to participate in reciprocal discovery may subsequently require defense counsel to produce a report or statement of an expert that is damaging to the defense even if defense counsel does not intend to use the report or statement at trial. Early in the progress of the case, when defense counsel generally makes the decision to participate in reciprocal discovery, he or she may be unaware that a consultation with an expert will

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[7]Of course, the defendant's obligation to disclose the reports and statements of experts will be limited to the extent that such materials constitute work product under rule 3.220(g)(1).

[8]The State had already obtained an analysis by FDLE of one of the blood samples. The result of the blood alcohol analysis prepared for the State by FDLE was 0.196, more than double the amount necessary to establish an unlawful blood alcohol level. See § 316.193(1)(b), Fla. Stat. (2009). At the hearing on the State's motion to compel reciprocal discovery, the trial judge asked the prosecutor, "Does the State have some compelling need to get [the Wuesthoff report]?" The prosecutor responded, "Well, yes, I would think so, Your Honor, because . . . [i]t corroborates whether or not our—our blood test is correct . . . which we have disclosed to [defense counsel]." The prosecutor also said, "And I suspect that [defense counsel] may use some of the information that he has in order to challenge our blood test." However, the prosecutor did not explain why there was any reason to doubt the accuracy of the FDLE analysis. And Ms. Kidder's counsel represented to the trial court that he did not intend to use the Wuesthoff report at trial.

become necessary. Defense counsel will almost surely be unaware of the nature of any potential test results. In the event defense counsel must disclose an adverse test result or report to the prosecution, the defendant may blame defense counsel for electing to participate in reciprocal discovery. On the other hand, an election not to participate in reciprocal discovery may limit defense counsel's ability to investigate fully the State's case against his or her client and to provide effective representation. Under these circumstances, defense counsel faces the risk that the defendant will fault him or her no matter which course counsel decides to pursue.[9]

However, the impact of the dilemma described above will not be limited to the criminal defense bar. The unfortunate dynamics of this situation are likely to give rise to a new variety of ineffective-assistance-of-counsel claims under rule 3.850. Everyone involved—defense counsel, prosecutors, and the courts—will be required to devote scarce resources to addressing such claims. To the extent that the reports and statements of experts constitute work product, they will remain off limits to prosecutors. To the extent that such reports and statements are not work product—as in this case—the State may win a limited, short-term advantage through the discovery of materials

[9]The dilemma the court's decision creates is similar to the dilemma defense counsel occasionally faced before the Supreme Court of Florida amended rule 3.250 and added rule 3.381 to eliminate the "sandwich." See In re Amendments to the Florida Rules of Criminal Procedure—Final Arguments, 957 So. 2d 1164 (Fla. 2007). Before the amendments to the rules, circumstances might force defense counsel to choose between presenting evidence other than the defendant's testimony and retaining the first and last closing argument. See Van Poyck v. State, 694 So. 2d 686, 697 (Fla. 1997); Diaz v. State, 747 So. 2d 1021, 1026 (Fla. 3d DCA 1999); Cole v. State, 700 So. 2d 33, 36 (Fla. 5th DCA 1997); Nicole Velasco, Taking the "Sandwich" Off the Menu: Should Florida Depart from Over 150 Years of Its Criminal Procedure and Let Prosecutors Have the Last Word?, 29 Nova L. Rev. 99, 116-18 (2004). One might argue that the elimination of the "sandwich" benefitted members of the criminal defense bar by relieving them of a tactical decision that was occasionally difficult to make.

that the defense does not intend to use at trial. Nevertheless, I doubt that any such short-term tactical advantage in a particular case warrants the additional use of scarce resources in the criminal justice system as a whole that the court's decision may cause.

For the reasons outlined above, I suggest that the Criminal Procedure Rules Committee of The Florida Bar may wish to consider whether rule 3.220(d)(1)(B)(ii) should be amended to limit the defense obligation under reciprocal discovery to provide the prosecution with reports or statements of experts. Such a limitation might require the defendant to disclose the reports and statement of experts only if the defendant intends to use such materials at trial or if the defendant intends to call the expert who prepared the report as a witness and the subject matter of the report relates to the expert's testimony. Such an amendment would make the defendant's obligation to disclose such materials under the Florida rules comparable to the defendant's obligation under the federal criminal rules. See Fed. R. Crim. P. 16(b)(1)(B). Such an amendment would avoid the dilemma for defense counsel described above and should not hinder the prosecution in the preparation of its cases.

ALTENBERND, Judge, Concurring.

I fully concur in Judge Casanueva's excellent opinion for the court. I also share many of the concerns addressed by Judge Wallace. Given the effort that both judges have devoted to this case, it should be obvious that we are troubled by the application of this rule of procedure in this context. Intuitively, most legal minds would initially believe that when the government compels you to provide your own blood as evidence against you, you ought to be entitled to receive a private report concerning the contents of that blood. See art. I, § 23, Fla. Const.

I would underscore our narrow holding: this court cannot prevent the State from seeking this report or the trial court from ordering its production to the State in the context of a common law petition for certiorari. If the State chooses to obtain and review this report, it will undoubtedly create additional issues for direct appeal that can be assessed under a different standard of review. Absent exceptional circumstances, if the trial court permits the State to use this second report at trial or allows the State to argue that "even the defendant's own expert concludes she was intoxicated," it is quite possible that this case may be tried more than once.