

## NOTES

### DUTY OF THE PROSECUTOR TO CALL WITNESSES WHOSE TESTIMONY WILL HELP THE ACCUSED TO ESTABLISH HIS INNOCENCE

The prosecutor, in a criminal case, is not at liberty, like a plaintiff in a civil case, to select out a part of an entire transaction which makes [the case] against the defendant, and then, to put the defendant to the proof of the other part . . . . The prosecuting officer represents the public interest, which can never be promoted by the conviction of the innocent. . . . [A]ll the witnesses present at the transaction, should be called by the prosecution, before the prisoner is put to his defense . . . .<sup>1</sup>

This statement by the Michigan Supreme Court is one of the earliest recognitions in this country of a duty of the prosecutor to call witnesses whose testimony may be favorable to the accused. A minority of jurisdictions have imposed an affirmative duty on the prosecutor to call certain categories of witnesses to safeguard against the suppression of evidence or to insure fairness to the accused. Other courts, which fail to recognize such an affirmative duty, might grant relief when the failure of the prosecutor to call a witness results in suppression or other unfairness to the accused.

The imposition of a duty to call witnesses is but one method used by the courts to assure defendants in criminal cases that all exculpatory evidence will come to the attention of the jury. Thus, the duty to call must be distinguished from other, related devices aimed at this end. Generally, if neither the defendant nor the prosecutor knows of certain evidence that would be helpful to the defendant, the later discovery of such material evidence will result in a reversal of the conviction. This newly discovered evidence remedy, however, is inappropriate when the prosecutor knows of the existence of exculpatory evidence, but the defendant does not. Under these circumstances, two other safeguards are available to protect defendants. The use of discovery procedures may enable a defendant to find out what evidence the prosecutor is going to use against him. Obviously, however, the prosecutor will not intend to introduce any evidence which will help the defendant's case. More significant to a defendant in this situation is the possible holding by courts that a suppression of material evidence by the prosecutor is a denial of the defendant's right to due process, whether the suppression involves active concealment or a mere failure to notify. Another avenue

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1. *Hurd v. People*, 25 Mich. 405, 416 (1872).

chosen by some courts in response to this issue is the one examined by this note—the imposition on the prosecutor of a duty to call certain witnesses. After such witnesses are on the stand, the courts must also decide whether the prosecutor must elicit testimony from them and whether both parties can use the tools of cross-examination. Clearly, all these devices, which are designed to bring about the same goal, overlap one another extensively. The devices other than the duty to call witnesses will be discussed only to clarify the precise role of the duty to call within the panoply of safeguards for the protection of a defendant.

If the accused must call a witness to the stand, he is faced with the procedural handicap imposed by the sponsorship doctrine that prohibits him from impeaching his own witness.<sup>2</sup> His ability to ask leading questions may be conditioned on a showing that the witness is hostile.<sup>3</sup> The prosecutor is given a tactical advantage in that he can impeach the witness for bad character, which might place a stigma on the accused's defense.<sup>4</sup> If the accused can force the prosecutor to call the witness, he avoids all of these handicaps and gains the right of cross-examination. It will be seen that the manner in which a court views the role of the prosecutor will largely govern whether it will relieve the accused of these handicaps. This note examines the history and current scope of the affirmative duty to call witnesses, explores reasons for the continuance or elimination of it, and examines recent attempts to establish it on constitutional grounds.

### I. THE AFFIRMATIVE DUTY

At early common law, the accused in a felony case was not permitted counsel, could not appear as a witness in his own behalf, and could not compel the attendance of witnesses.<sup>5</sup> Presumably in an effort to soften the rigors of these limitations, a rule evolved in England in the early nineteenth century that the prosecutor in felony cases was under a duty to call (1) all eyewitnesses to the offense, and (2) all witnesses whose names were endorsed on the indictment as having appeared before the grand jury.<sup>6</sup> A number of

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2. McCORMICK, EVIDENCE § 38 (1954). See generally Note, 49 VA. L. REV. 996 (1963).

3. McCORMICK, EVIDENCE § 6 (1954).

4. *Lopez v. United States*, 373 U.S. 427, 444 (1963) (concurring opinion); *United States v. Ramsey*, 220 F. Supp. 86, 89 (E.D. Tenn. 1963); see McCORMICK, EVIDENCE § 42 (1954); cf. *People v. Cleminson*, 250 Ill. 135, 95 N.E. 157 (1911).

5. 1 CHITTY, CRIMINAL LAW 624-25 (4th ed. 1841); see, e.g., *Keller v. State*, 123 Ind. 110, 23 N.E. 1138 (1890); *State v. Smith*, 78 Minn. 362, 81 N.W. 17 (1899); *Hill v. Commonwealth*, 88 Va. 633, 14 S.E. 330 (1892).

6. 7 WIGMORE, EVIDENCE § 2079 (3d ed. 1940). It is Professor Wigmore's position that the rule never achieved the status of a rule of law, but was merely a rule of ethics

nisi prius decisions embodying the rule<sup>7</sup> were relied on by American courts in establishing the duty to call witnesses in this country.<sup>8</sup>

### A. Michigan

Michigan was the first state to recognize the duty, and the bulk of pertinent American decisions is found in the Michigan reports. Early Michigan cases were cited and followed in other jurisdictions<sup>9</sup> and that state's decisions have played a major role in the development of this area of the law. Therefore, Michigan law will be isolated for an intensive historical and analytical treatment to serve as a base for the analysis of the duty in other jurisdictions.

The rule as currently stated in Michigan is that the prosecutor must call every *res gestae* witness,<sup>10</sup> whose testimony will not merely be cumulative, if calling the witness is reasonably necessary to protect the accused against a false accusation.<sup>11</sup> Without embarking at this point on a detailed discussion of which witnesses are *res gestae* witnesses and which of these are reasonably necessary to protect the accused against a false accusation, it is sufficient to note that the Michigan Supreme Court in imposing the duty considers the degree of the offense,<sup>12</sup> the number of witnesses available,<sup>13</sup> the importance

observed only because of the peculiar relationship between the English bench and bar. However, he observes that American courts viewed it as a rule of law and therefore, for the purpose of assessing the prosecutor's duty to call witnesses in this country, the problem of whether it ever attained that status in England is of no consequence.

7. *Regina v. Stroner*, 1 Car. & K. 650, 174 Eng. Rep. 976 (N.P. 1845); *Regina v. Holden*, 8 Car. & P. 606, 173 Eng. Rep. 638 (N.P. 1837); *Regina v. Chapman*, 8 Car. & P. 558, 173 Eng. Rep. 617 (N.P. 1837). For a list of other English cases decided at nisi prius during this period see 7 WIGMORE, EVIDENCE § 2079 n.1 (3d ed. 1940).

8. The three cases cited in note 7 *supra* were cited in *Maher v. People*, 10 Mich. 212 (1862); *Morrow v. State*, 57 Miss. 836 (1880); *Territory v. Hanna*, 5 Mont. 248, 5 Pac. 252 (1884).

9. *E.g.*, *Territory v. Hanna*, *supra* note 8; *State v. McGahey*, 3 N.D. 293, 55 N.W. 753 (1893); *Hunnicut v. State*, 20 Tex. App. 632 (1886).

10. The term "*res gestae* witnesses" is used throughout this note to indicate those witnesses who must be called because they possess knowledge of part of the criminal transaction. Although this term has come to mean many things, and thus practically nothing, it was felt that the terminology used by the courts should be employed to avoid compounding the confusion. For a discussion of the history of the term and its meanings, see 6 WIGMORE, EVIDENCE §§ 1767-69 (3d ed. 1940).

11. *People v. Durkee*, 369 Mich. 618, 120 N.W.2d 729 (1963); *People v. Kayne*, 268 Mich. 186, 255 N.W. 758 (1934); see *People v. Bartlett*, 312 Mich. 648, 20 N.W.2d 758 (1945).

12. *E.g.*, *People v. Redman*, 250 Mich. 334, 230 N.W. 196 (1930); *People v. Kindra*, 102 Mich. 147, 60 N.W. 458 (1894); *Bonker v. People*, 37 Mich. 4 (1877); see *People v. Kayne*, *supra* note 11; *People v. Long*, 44 Mich. 296, 6 N.W. 673 (1880). For a full discussion of this issue see notes 41-45 *infra* and accompanying text.

13. When the number of witnesses is small and the crime is a serious one, the courts are less likely to excuse the prosecutor's duty to call a given witness on the ground that

of the testimony the witness may give,<sup>14</sup> the relationship of the witness to the accused,<sup>15</sup> the participation of the witness in the crime for which the accused is being tried,<sup>16</sup> and the likelihood that the witness will commit perjury.<sup>17</sup> Furthermore, when the prosecutor is required to call the witness as a *res gestae* witness, he is not required to examine him.<sup>18</sup>

### 1. *Development of the Duty*

The rule finds its origin in dicta in four early cases which held that the prosecutor is under a duty to present all the evidence of a criminal transaction, all of the so-called *res gestae*, whether the evidence tends to prove the defendant's guilt or innocence.<sup>19</sup> Thus, not only was the prosecutor required to satisfy the burden of proving the defendant guilty beyond a reasonable doubt, but he was further required to call witnesses whose testi-

the evidence the witness will give is merely cumulative. See, *e.g.*, *People v. Castelli*, 370 Mich. 147, 121 N.W.2d 438 (1963); *People v. Durkee*, 369 Mich. 618, 120 N.W.2d 729 (1963); *People v. Burnstein*, 261 Mich. 534, 246 N.W. 217 (1933); *People v. McCullough*, 81 Mich. 25, 45 N.W. 515 (1890).

14. See, *e.g.*, *People v. Castelli*, *supra* note 13 (the only witness who could contradict the identifying witnesses); *People v. Burnstein*, *supra* note 13 (apparently the only witness who saw the perpetrator flee); *Thomas v. People*, 39 Mich. 309 (1878) (only unbiased eyewitness at the scene of the assault).

15. For a discussion of relieving the duty when relatives of the accused are witnesses see text accompanying notes 68-72 *infra*.

16. For a discussion of excusing witnesses who are alleged accomplices of the accused see text accompanying notes 61-67 *infra*.

17. For a discussion of excusing the duty in reference to perjurers see text accompanying notes 73-75 *infra*. That this consideration is the foundation of the exceptions to the duty to call relatives and accomplices, see text accompanying notes 58-60 *infra*.

18. *People v. Hughes*, 116 Mich. 80, 74 N.W. 309 (1898); *People v. Deitz*, 86 Mich. 419, 49 N.W. 296 (1891); see *People v. Pope*, 108 Mich. 361, 66 N.W. 213 (1896). *Contra*, *People v. Hill*, 258 Mich. 79, 241 N.W. 873 (1932) (dictum); see *Hurd v. People*, 25 Mich. 405 (1872); *Maher v. People*, 10 Mich. 212 (1862).

19. *Strang v. People*, 24 Mich. 1, 10 (1871); *Patten v. People*, 18 Mich. 314 (1869); *Brown v. People*, 17 Mich. 429, 433-34 (1868); *Maher v. People*, *supra* note 18.

[W]henever it may appear evident to the Court, that but a part of the facts, or a single fact, has been designedly selected by the prosecution from the series constituting the *res gestae*, or entire transaction, and that the evidence of the others is within the power of the prosecutor, it would . . . be the duty of the court to require the prosecutor to show the transaction as a whole. *Id.* at 226.

In the *Patten* case, the court observed: "[I]t was not only the right, but the duty of the prosecution to show generally the transaction as a whole, its nature and its objects, whether its tendency should be to show the guilt or innocence of the defendant." *Patten v. People*, *supra* at 327.

In the *Strang* case, the court, in referring to the circumstances immediately preceding and following the transaction in question, said that this evidence "was not only admissible, but it was the plain duty of the prosecution to put it in." *Strang v. People*, *supra* at 10.

mony would weaken his case, despite the fact that these witnesses would ordinarily have been called by the defendant—at least to the extent that he was aware of their existence. Consequently, the prosecutor, at this early stage, was not allowed to present only that evidence which would tend to pose his case in its strongest light.

The duty focused primarily on the evidence that the prosecutor was required to produce and only secondarily on the witnesses that he had to call in doing so.<sup>20</sup> Cases then began to emphasize the types of witnesses the prosecutor was obliged to call in satisfying this duty.<sup>21</sup> When the court ultimately held that the prosecutor had fulfilled his duty by calling the *res gestae* witnesses to the stand and turning them over to the accused for cross-examination,<sup>22</sup> it performed a neat bit of surgery that relieved the prosecutor of any duty to elicit exculpatory evidence adverse to his case.<sup>23</sup> He is apparently free of any such affirmative duty today, except to the extent that he faces reversal of a conviction if material evidence fails to come to the defendant's attention prior to conviction.<sup>24</sup> Such evidence is characterized as newly discovered evidence and relief is granted if it is sufficiently material to have been likely to affect the result of the trial.<sup>25</sup>

Obviously, if the evidence fails to come to light because of a failure to call a *res gestae* witness, who was not known to the accused, then reversal follows because of the failure to meet the requirements of the *res gestae* witness rule.<sup>26</sup> The newly discovered evidence rule complements the *res*

20. See *Hurd v. People*, 25 Mich. 405 (1872); *Strang v. People*, *supra* note 19; *Patten v. People*, *supra* note 19; *Brown v. People*, *supra* note 19; *Maher v. People*, *supra* note 18.

21. See *People v. Etter*, 81 Mich. 570, 45 N.W. 1109 (1890) (material witness); *Thomas v. People*, 39 Mich. 309 (1878) (eyewitness to an assault with intent to kill); *Wellar v. People*, 30 Mich. 16 (1874) (eyewitness to a homicide).

22. *People v. Deitz*, 86 Mich. 419, 49 N.W. 296 (1891).

23. See, *e.g.*, *People v. Hughes*, 116 Mich. 80, 74 N.W. 309 (1898); *People v. Deitz*, *supra* note 22.

24. See *People v. Ake*, 362 Mich. 134, 106 N.W.2d 800 (1961) (court assumed the prosecutor knew or should have known of the evidence); *People v. Parisi*, 270 Mich. 429, 259 N.W. 127 (1935) (neither defendant nor prosecutor knew of the evidence).

25. *People v. Ake*, *supra* note 24; see *People v. Parisi*, *supra* note 24.

26. See *People v. Blazenzitz*, 212 Mich. 675, 180 N.W. 370 (1920). Although the court did not hold the witness was a *res gestae* witness, in a later decision it stated that the witness in question in the *Blazenzitz* case was such a witness. *People v. Schwartz*, 215 Mich. 197, 183 N.W. 723 (1921).

However, if the defendant does know of the existence of the witness he must make a timely request that the prosecutor be compelled to call the witness or the court may be reluctant to give relief on appeal. See, *e.g.*, *People v. Kynerd*, 314 Mich. 107, 22 N.W.2d 90 (1946); *People v. Higgins*, 127 Mich. 291, 86 N.W. 812 (1901). The defendant cannot sit back and await a verdict or the close of the prosecution's case before raising an objection to the failure to call the witness. See, *e.g.*, *People v. Flynn*, 330

*gestae* witness requirement when a witness is called by the prosecutor, but in examination of the witness by the defendant's counsel, material evidence is not elicited because the defendant was unaware that the witness possessed it.<sup>27</sup> Consequently, in Michigan, these two rules in combination, rather than the more widely accepted suppression doctrine, insure defendants that all exculpatory evidence will be brought to their attention; the fact that the prosecutor's conduct might include some form of suppression is apparently of no consequence.<sup>28</sup>

## 2. Endorsement of *Res Gestae* Witnesses on the Information

It should be noted that the branch of the English rule which required the calling of all witnesses whose names had been endorsed on the indictment was never adopted in Michigan.<sup>29</sup> Though court decisions fail to discuss the

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Mich. 130, 47 N.W.2d 47 (1951); *People v. Kynerd, supra*; *People v. Greco*, 308 Mich. 314, 13 N.W.2d 832 (1944); *People v. Kolodzieski*, 237 Mich. 654, 212 N.W. 958 (1927). This consideration is not present when the defendant is ignorant of the existence of the witness. See *People v. Blazenzitz, supra*.

27. In *People v. Ake*, 362 Mich. 134, 106 N.W.2d 800 (1961), the court reversed the conviction of a woman for the murder of her husband. In calling a deputy sheriff to the stand, the prosecutor failed to elicit evidence that the witness had heard the deceased threaten bodily harm to his wife a short time prior to the killing. Her defense was self-defense. The defendant became aware of the evidence after the trial, and the court said the evidence was material enough to support reversal of the conviction. It was treated as new evidence rather than suppressed testimony. The court accepted the defendant's contention that the prosecutor knew or should have known of the evidence at the time of the trial.

28. See *People v. Ake, supra* note 27; *People v. Parisi*, 270 Mich. 429, 259 N.W. 127 (1935). *But see* *People v. Blazenzitz*, 212 Mich. 675, 180 N.W. 370 (1920).

In the *Ake* case the court accepted the defendant's contention that the prosecutor knew or should have known of the existence of the evidence which failed to come to the attention of the accused until after the trial. In the *Parisi* case the prosecutor was apparently as ignorant of the existence of the exculpatory evidence as the accused. Both convictions were reversed because of newly discovered evidence, the court failing to differentiate between the two despite the suppression involved in *Ake*. In the *Blazenzitz* case, decided forty-one years earlier than the *Ake* case, the court strongly criticized the prosecution's concealment or suppression of the evidence possessed by a witness near the scene of the crime. Although the cases might be distinguished because in *Ake* the prosecutor called the witness but failed to elicit the evidence, while in *Blazenzitz* he failed to make known the existence of the witness, the cases seem to conflict. In both cases the prosecutor failed to disclose evidence. However, in *Ake*, this failure to disclose was not viewed by the court in traditional terms of suppression, but rather in the context of newly discovered evidence—ignoring considerations of reprehensible conduct on the part of the prosecutor.

29. As early as *Wellar v. People*, 30 Mich. 16 (1874), the court said that the endorsement of the witness's name by the prosecutor did not thereby require the prosecutor to call the witness to the stand. *E.g.*, *People v. Whitmore*, 230 Mich. 435, 203 N.W. 87 (1925); *People v. Quick*, 51 Mich. 547, 18 N.W. 375 (1884) (per curiam).

reason for this, the answer may lie in the fact that the rule requiring calling of *res gestae* witnesses was at its outset broad enough to effectuate substantially the apparent purpose of the English rule, that is, a presentation of all material evidence bearing on the guilt or innocence of the accused.<sup>30</sup> Early cases indicated that material witnesses must be called even though they were not eyewitnesses to the criminal transaction.<sup>31</sup>

The Michigan Supreme Court early held that the endorsement of the name of a witness on the indictment placed only a burden of production on the prosecutor.<sup>32</sup> The accused then was free to call the witness to the stand if he chose to do so. Any duty imposed on the prosecutor to call an endorsed witness to the stand depended on whether the witness could properly be classified as a *res gestae* witness. By statute,<sup>33</sup> the prosecutor is required to endorse the names of *res gestae* witnesses on the information or indictment. Therefore, the court is often considering the problem of who must be endorsed side-by-side with the question of who must be called to the stand by the prosecutor.<sup>34</sup> The failure of the court to segregate adequately these issues has often resulted in confusing and loose language.<sup>35</sup>

### 3. Scope and Meaning of the Term "Res Gestae Witness"

In attempting to define the term "*res gestae* witness," it is necessary to consider the Michigan Supreme Court's definition in light of the purposes for the imposition of the duty to call. The court's stated reasons for imposing the duty are (1) to avoid suppression of evidence favorable to the accused,<sup>36</sup> and (2) to protect the accused against a false accusation<sup>37</sup> by giving him the opportunity, through cross-examination privileges, to elicit exculpatory evi-

30. See *Hurd v. People*, 25 Mich. 405 (1872); *Strang v. People*, 24 Mich. 1 (1871); *Patten v. People*, 18 Mich. 314 (1869); *Maher v. People*, 10 Mich. 212 (1862).

31. *People v. Etter*, 81 Mich. 570, 45 N.W. 1109 (1890); *People v. Swetland*, 77 Mich. 53, 43 N.W. 779 (1889).

32. *E.g.*, *People v. Henshaw*, 52 Mich. 564, 18 N.W. 360 (1884); *People v. Quick*, 51 Mich. 547, 18 N.W. 375 (1884) (per curiam); *Wellar v. People*, 30 Mich. 16 (1874).

33. MICH. STAT. ANN. § 28.980 (1954).

34. *E.g.*, *People v. Castelli*, 370 Mich. 147, 121 N.W.2d 438 (1963); *People v. Kayne*, 268 Mich. 186, 255 N.W. 758 (1934); *People v. Knoll*, 258 Mich. 89, 242 N.W. 222 (1932); *People v. Blazenzitz*, 212 Mich. 675, 180 N.W. 370 (1920).

35. See, *e.g.*, *People v. Castelli*, *supra* note 34 (confusing use of the term "produce"); *People v. Van Vorce*, 240 Mich. 75, 215 N.W. 5 (1927); *People v. Blazenzitz*, *supra* note 34.

36. *People v. Tann*, 326 Mich. 361, 40 N.W.2d 184 (1949); *People v. Raider*, 256 Mich. 131, 239 N.W. 387 (1931); *People v. Kindra*, 120 Mich. 147, 60 N.W. 458 (1894); *Bonker v. People*, 37 Mich. 4 (1877).

37. *People v. Bartlett*, 312 Mich. 648, 20 N.W.2d 758 (1945); *People v. Kayne*, 268 Mich. 186, 255 N.W. 758 (1934).

dence.<sup>38</sup> A nebulous term at best, *res gestae* has been defined by the state's supreme court as the "facts and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character."<sup>39</sup> The term cannot be arbitrarily confined to limits of time and includes "the facts which so illustrate and characterize the principal fact as to constitute the whole one transaction, and render the latter necessary to exhibit the former in its proper effect."<sup>40</sup>

In considering the duty to call *res gestae* witnesses the court is actually faced with two issues: (1) what categories of witnesses can be properly characterized as *res gestae* witnesses, and (2) if a witness falls into such a category, should the prosecutor be compelled to call the witness in light of the circumstances of the given case.

Eyewitnesses to homicides,<sup>41</sup> crimes of violence,<sup>42</sup> and other felonies,<sup>43</sup> are *res gestae* witnesses. The same is true of eyewitnesses to the flight of the perpetrator of a felony.<sup>44</sup> Eyewitnesses to misdemeanors are not labeled *res gestae* witnesses by the court.<sup>45</sup> Decisions by the Supreme Court of Michigan differ as to whether a person at the scene who evidently heard, but did not see, a crime take place is a *res gestae* witness.<sup>46</sup> Those witnesses who can give particularly material testimony bearing on the guilt or innocence of the accused have also been designated *res gestae* witnesses, whether or not the evidence was directly related to the criminal act.<sup>47</sup>

38. *People v. Raider*, 256 Mich. 131, 239 N.W. 387 (1931).

39. *People v. Kayne*, 268 Mich. 186, 191, 255 N.W. 758, 760 (1934).

40. *Id.* at 192, 255 N.W. at 760.

41. *E.g.*, *People v. Durkee*, 369 Mich. 618, 120 N.W.2d 729 (1963) (even though the witness contended she had no memory of the incident); *People v. Hunley*, 313 Mich. 688, 21 N.W.2d 923 (1946); *People v. Connor*, 295 Mich. 1, 294 N.W. 74 (1940); *Hurd v. People*, 25 Mich. 405 (1872).

42. *E.g.*, *People v. Serra*, 301 Mich. 124, 3 N.W.2d 35 (1942); *People v. Germaine*, 101 Mich. 485, 60 N.W. 44 (1894); *People v. Kenyon*, 93 Mich. 19, 52 N.W. 1033 (1892); *Thomas v. People*, 39 Mich. 309 (1878); see *People v. Hughes*, 116 Mich. 80, 74 N.W. 309 (1898).

43. *E.g.*, *People v. Kayne*, 268 Mich. 186, 255 N.W. 758 (1934); *People v. Swetland*, 77 Mich. 53, 43 N.W. 779 (1889).

44. *E.g.*, *People v. Castelli*, 370 Mich. 147, 121 N.W.2d 438 (1963) (even though the witness got only a fleeting glimpse); *People v. Burnstein*, 261 Mich. 534, 246 N.W. 217 (1933); *People v. Blazenzitz*, 212 Mich. 675, 180 N.W. 370 (1920). *But see* *People v. Savant*, 112 Mich. 297, 70 N.W. 576 (1897) (no sufficient reason to believe the person seen was perpetrator).

45. *E.g.*, *People v. Moore*, 155 Mich. 107, 118 N.W. 742 (1908); *People v. Kindra*, 102 Mich. 147, 60 N.W. 458 (1894).

46. *People v. Ake*, 362 Mich. 134, 106 N.W.2d 800 (1961) (holding that the witness was not a *res gestae* witness); *People v. Tann*, 326 Mich. 361, 40 N.W.2d 184 (1949) (required the calling of the witness).

47. *E.g.*, *People v. Zabijak*, 285 Mich. 164, 280 N.W. 149 (1938) (policeman would have testified that defendant appeared insane before killing); *People v. Etter*, 81 Mich.

It is submitted that all the witnesses discussed above should be classified as *res gestae* witnesses; all should be called unless the circumstances of the case dictate otherwise. A close analysis of the cases leads to the conclusion that the court in fact operates this way, failing, however, to differentiate its decision not to require the calling of the witness under the circumstances from its designation of the witness as *res gestae* or non *res gestae*.<sup>48</sup> The imprecise use of the term *res gestae* witness to cover both issues, *i.e.*, the general types of witnesses that should be called and the effect of the particular circumstances on the calling of the particular witness, has made impossible a meaningful definition of *res gestae* witnesses.

#### 4. *Witnesses the Prosecutor Is Excused From Calling*

Once the witness has been designated a *res gestae* witness he must be called unless calling is excused by one of five exceptions to the rule. The exceptions cover witnesses (1) whose testimony is cumulative; (2) who are not available; (3) who are accomplices, or (4) close relatives of the accused, or (5) who are charged with perjury. Not all witnesses who fit into these categories are excepted, however; the singular characteristics of some cases may create exceptions to the exceptions.

*a. witnesses whose testimony will be cumulative.* The prosecutor is not required to call a witness whose testimony will be cumulative.<sup>49</sup> The exception springs from the early cases, when the duty was stated in terms of presenting the whole transaction.<sup>50</sup> When the prosecutor has done so, or, in terms of the duty as it stands today, when he has presented witnesses from

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570, 45 N.W. 1109 (1890) (statutory rape case) (witness would have testified girl was over age of consent); see *People v. Kayne*, 268 Mich. 186, 255 N.W. 758 (1934) (doctor who examined alleged fake victim in insurance hoax); *People v. Long*, 44 Mich. 296, 6 N.W. 673 (1880).

In the *Long* case, as in others, the court failed to make clear that it is considering two issues, *i.e.* whether the witness should be labeled a *res gestae* witness, and if so must he be called by the prosecutor. The accused, a 17-year-old boy, stole a wallet at a music hall. There was evidence, given by a prosecution witness, that the boy's father searched him, took a gold piece from him and placed it in his pocket. The court upheld a trial court ruling that the prosecutor need not call the father to the stand. In doing so, it failed to decide specifically whether the witness was a *res gestae* witness. However, in discussing the case later in *People v. Kayne*, *supra*, the court held that the father in *Long* was a *res gestae* witness. The court in *Long* had apparently excused calling the witness because of the relationship of the father to the accused and the severity of the crime (theft).

48. See, *e.g.*, *People v. Moore*, 155 Mich. 107, 118 N.W. 742 (1908); *People v. Kindra*, 102 Mich. 147, 60 N.W. 458 (1894).

49. *E.g.*, *People v. Raider*, 256 Mich. 131, 239 N.W. 387 (1931); *People v. Redman*, 250 Mich. 334, 230 N.W. 196 (1930); *Hurd v. People*, 25 Mich. 405 (1872).

50. *Wellar v. People*, 30 Mich. 16 (1874); *Hurd v. People*, *supra* note 49.

whom this evidence can be elicited, he has fulfilled his duty and need not call those witnesses whose testimony will add nothing new. The danger that evidence favorable to the accused will be suppressed is no longer present.<sup>51</sup> Witnesses whose evidence will contradict that of the prosecutor's other witnesses should not fall within the cumulative exception, though cases indicate that this is a common plea raised by the prosecutor in attempting to avoid the duty.<sup>52</sup> When the number of witnesses is small or the crime a serious one, the courts are reluctant to label the testimony of a witness cumulative.<sup>53</sup>

*b. unavailable witnesses.* The prosecutor is excused from calling a *res gestae* witness who is unavailable if he has used due diligence to secure his attendance at the trial.<sup>54</sup> This exception is applicable to persons outside the jurisdiction of the court,<sup>55</sup> those whose identity is not known to the prosecutor,<sup>56</sup> or those who cannot attend because of special circumstances.<sup>57</sup> This exception is no more than a statement that the prosecutor should not be held to the performance of a duty which he cannot reasonably fulfill because of circumstances beyond his control.

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51. See *People v. Redman*, 250 Mich. 334, 230 N.W. 196 (1930). However, one situation can be hypothesized in which the prosecutor could use the cumulative exception to great advantage. If several witnesses who possess a particular piece of information have experience facing cross-examination, for example, veteran police officers, while another witness with this information is likely to be easily rattled by vigorous cross-examination, the prosecutor can choose his most dependable witnesses and claim the others would be cumulative.

52. *E.g.*, *People v. Bartlett*, 312 Mich. 648, 20 N.W.2d 758 (1945); *People v. Blazenzitz*, 212 Mich. 675, 180 N.W. 370 (1920); *Thomas v. People*, 39 Mich. 309 (1878).

53. See, *e.g.*, *People v. Germaine*, 101 Mich. 485, 60 N.W. 44 (1894); *People v. Etter*, 81 Mich. 470, 45 N.W. 1109 (1890).

54. *People v. Castelli*, 370 Mich. 147, 121 N.W.2d 438 (1963); *People v. Hunley*, 313 Mich. 688, 21 N.W.2d 923 (1946); *People v. Serra*, 301 Mich. 124, 3 N.W.2d 35 (1942); *People v. Zabijak*, 285 Mich. 164, 280 N.W. 149 (1938); see *People v. Van Vorce*, 240 Mich. 75, 215 N.W. 5 (1927). The *Van Vorce* case held that a letter to the commanding officer of police officers who were *res gestae* witnesses was not sufficient to satisfy due diligence and that the prosecutor must use subpoenas or other means at hand to assure attendance. The same requirement was voiced in the *Zabijak* case, where there was no showing that the prosecutor had in fact made any attempt to secure the attendance of the witness. In the *Hunley* and *Serra* cases, the court held that the prosecutor is not required to resort to the statute which can be used to secure the attendance of witnesses outside the jurisdiction of the court. MICH. STAT. ANN. § 28.1021 (1954). The court said that only a "reasonable effort" was required and this did not require use of the statute.

55. See *People v. Hunley*, *supra* note 54; *People v. Serra*, *supra* note 54.

56. *People v. Todaro*, 253 Mich. 367, 235 N.W. 185 (1931).

57. See *People v. Hossler*, 135 Mich. 384, 97 N.W. 754 (1904) (witness was old, feeble and 50 miles away).

*c. accomplices and relatives.* The exceptions for accomplices and close relatives of the accused are based on the premise that such persons are biased toward the accused and if necessary may lie to protect him.<sup>58</sup> Since they are likely to be actively or willingly participating in his defense,<sup>59</sup> there is little likelihood that suppression of evidence favorable to the accused will occur if these witnesses are not called. It is equally unlikely that he will need the tool of cross-examination to elicit facts favorable to his defense from them.<sup>60</sup> The cases defining these exceptions indicate a reluctance to allow any erosion of the prosecutor's duty to call witnesses and, therefore, narrowly limit the range of these two exceptions.

While the prosecutor has been excused from calling an accomplice jointly charged<sup>61</sup> or a person charged with aiding and abetting the accused in perpetration of the crime for which he is on trial,<sup>62</sup> he has been required to call a participant not charged,<sup>63</sup> and one who was charged jointly with the accused in commission of a crime other than the one for which the accused was on trial.<sup>64</sup> The court required the calling of witnesses jointly charged where evidence showed there was no concert of action,<sup>65</sup> of a witness who was the willing participant in a crime involving sexual intercourse,<sup>66</sup> and of an accomplice when there was evidence of entrapment.<sup>67</sup> Apparently, except in those situations in which the accused and the witness are charged with participating in the commission of the same offense, their community of in-

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58. *People v. Raider*, 256 Mich. 131, 239 N.W. 387 (1931).

Obviously the exceptions were founded upon the recognized inclination or inducement of those close to the accused, by community of interest in the crime or relationship, to perjure themselves, if they deem it necessary, in his behalf and the incongruity of requiring the prosecution to make such witnesses its own. *Id.* at 135-36, 239 N.W. at 389.

59. See *People v. Long*, 44 Mich. 296, 6 N.W. 673 (1880) (father of the accused actively assisting in his defense).

60. See *People v. Raider*, 256 Mich. 131, 239 N.W. 387 (1931).

61. *E.g.*, *People v. Knoll*, 258 Mich. 89, 242 N.W. 222 (1932); *People v. Baker*, 112 Mich. 211, 70 N.W. 431 (1897); see *People v. Considine*, 105 Mich. 149, 63 N.W. 196 (1895). *Contra*, *People v. Hill*, 236 Mich. 672, 211 N.W. 39 (1926) (dictum).

62. *People v. Kennan*, 275 Mich. 452, 266 N.W. 468 (1936).

63. *People v. Raider*, 256 Mich. 131, 239 N.W. 387 (1931); see *People v. Kayne*, 268 Mich. 186, 255 N.W. 758 (1934) (court acknowledged defendant's guilt if witness helped perpetrate the crime). *Contra*, *People v. Resh*, 107 Mich. 251, 65 N.W. 99 (1895).

In *Raider*, the court added the further requirement that if the prosecutor charges the accessory or accomplice, he must do so fairly and with no intent to circumvent the *res gestae* witness rule.

64. *People v. Tann*, 326 Mich. 361, 40 N.W.2d 184 (1949).

65. *People v. McCullough*, 81 Mich. 25, 45 N.W. 515 (1890).

66. See *People v. Elco*, 131 Mich. 519, 94 N.W. 1069 (1903) (dictum).

67. *People v. Gordon*, 40 Mich. 716 (1879).

terest is not great enough to override the asserted reasons for enforcing the *res gestae* witness rule.

Close family ties have served as grounds for excusing the calling of witnesses. The prosecutor was excused from calling the accused's wife, the only witness to a homicide, even though the defendant had specifically waived any privilege to object to her being used as a witness against him.<sup>68</sup> However, the court required the prosecutor to call the sister of the accused in a case of assault with intent to murder in which the victim was her fiancée.<sup>69</sup> The circumstances had obviously caused the court to decide that her partisanship to the accused might be less than in the ordinary brother-sister situation. The court has excused the calling of a father<sup>70</sup> and mother<sup>71</sup> of the accused when confronted directly with the problem. Friendship toward the accused is probably not enough to excuse the duty.<sup>72</sup>

*d. perjurers.* In *People v. Raider*<sup>73</sup> the court excused the calling of four alleged eyewitnesses to a murder. The four had been defense witnesses at an earlier trial of another participant. Prior to the *Raider* trial they had been charged with perjury in connection with their testimony at the earlier trial. In excusing the prosecutor from endorsing and calling the witnesses, the court pointed out that to require the prosecutor to call the witnesses would be virtually ordering a repetition of the perjury. Declining to lay down a hard and fast rule for excusing the endorsement and calling of such witnesses, the court held that the trial judge could do so when he was convinced that the charges were made in good faith, and that the accused is protected against the suppression of testimony and is not prejudiced in his rights of cross-examination and to a fair trial. The narrow exception, as laid down in the *Raider* case, does not extend to those witnesses in whom the prosecutor has no faith<sup>74</sup> or those who have made prior inconsistent statements.<sup>75</sup>

68. *People v. Hossler*, 135 Mich. 384, 97 N.W. 754 (1904).

69. *People v. Germaine*, 101 Mich. 485, 60 N.W. 44 (1894).

70. *People v. Long*, 44 Mich. 296, 6 N.W. 673 (1880). *But see* *People v. Harris*, 95 Mich. 87, 54 N.W. 648 (1893).

71. *See* *People v. Ake*, 362 Mich. 134, 106 N.W.2d 800 (1961). *But see* *People v. Harris*, *supra* note 70.

72. *See* *People v. Durkee*, 369 Mich. 618, 120 N.W.2d 729 (1963); *People v. Burnstein*, 261 Mich. 534, 246 N.W. 217 (1933). The fact that the witness is hostile to the prosecutor is never enough to do so. *See* *People v. Hill*, 236 Mich. 672, 211 N.W. 39 (1926); *People v. Elco*, 131 Mich. 519, 94 N.W. 1069 (1903); *Wellar v. People*, 30 Mich. 16 (1874).

73. 256 Mich. 131, 239 N.W. 387 (1931).

74. *See* *People v. Etter*, 81 Mich. 570, 45 N.W. 1109 (1890).

75. *People v. Blazenzitz*, 212 Mich. 675, 180 N.W. 370 (1920).

### 5. *Examining the Res Gestae Witness*

If the witness is a *res gestae* witness and his calling has not been excused by one of the exceptions discussed above, the prosecutor must call him to the stand and then may either examine him or merely turn him over to the accused for cross-examination.<sup>76</sup> If the prosecutor elects to examine the witness, he is allowed by statute<sup>77</sup> to impeach him as though he were called by the accused. Evidence introduced to impeach the witness's testimony is not substantive evidence of the defendant's guilt and goes only to the credibility of the witness.<sup>78</sup> Even prior to the passage of the statute one case had held that the prosecutor could impeach witnesses he was required to call.<sup>79</sup> The question whether the prosecutor may call a witness under the *res gestae* witness rule and immediately impeach him for past criminal record, bad character or bias without even attempting to elicit any evidence through direct examination has not been posed to the courts. While this would seem to be allowed under a literal reading of the statute, the prosecutor should not be permitted to do so. Impeachment is designed to challenge the credibility of the witness, and until he has offered some evidence there is no reason to do so. Therefore any such attack should be restricted to situations in which the prosecutor has first elicited the evidence on direct examination or when he is given an opportunity to question the witness on redirect examination after the witness has been cross-examined by the accused.

Court decisions stress that the accused is entitled to cross-examine the witness the prosecutor is required to call.<sup>80</sup> However, the meaning of "cross-examination" within the *res gestae* witness rule is uncertain. In other than the *res gestae* witness cases, the opponent in a Michigan court is allowed to cross-examine on any facts modifying the direct examination,<sup>81</sup> and as to all facts which explain the effect of the facts of the proponent's case as brought out on direct examination. He apparently is prohibited from eliciting facts on cross-examination that apply only to his own case.<sup>82</sup> Obviously, under

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76. *People v. Hughes*, 116 Mich. 80, 74 N.W. 309 (1898); *People v. Deitz*, 86 Mich. 419, 49 N.W. 296 (1891); see *People v. Hossler*, 135 Mich. 384, 97 N.W. 754 (1904).

77. MICH. STAT. ANN. § 28.980(1) (1954).

78. *People v. Durkee*, 369 Mich. 618, 120 N.W.2d 729 (1963).

79. *People v. Connor*, 295 Mich. 1, 294 N.W. 74 (1940); see *People v. Burnstein*, 261 Mich. 534, 246 N.W. 217 (1933); *People v. Hill*, 236 Mich. 672, 211 N.W. 39 (1926).

80. *E.g.*, *People v. Raider*, 256 Mich. 131, 239 N.W. 387 (1931); *People v. Pope*, 108 Mich. 361, 66 N.W. 213 (1896); *People v. Deitz*, 86 Mich. 419, 49 N.W. 296 (1891).

81. 6 WIGMORE, EVIDENCE §§ 1889-90 (3d ed. 1940). One author suggests that Michigan may be classified with jurisdictions espousing wide-open cross-examination. MC-CORMICK, EVIDENCE § 21 n.2 (1954).

82. See 6 WIGMORE, EVIDENCE §§ 1889-90 (3d ed. 1940).

the early form of the *res gestae* witness rule, *i.e.*, that the prosecutor must present all the evidence proving the guilt or innocence of the accused, it made little difference whether cross-examination was confined narrowly to points brought out on direct examination. However, the question of the scope of cross-examination becomes critical under the modern *res gestae* witness rule, *i.e.*, that the prosecutor must place the witness on the stand and need not elicit any information. If the prosecutor refuses to examine such a witness, to what extent may the accused cross-examine him? Since nothing has been brought out on direct examination, does the witness become the witness of the accused when "cross-examination" begins? These questions have not been resolved in the state's courts. In the only case dealing directly with the point, a majority of the court cannot be found on either side of the issue.<sup>83</sup> If the accused must adopt the witness as his own in eliciting evidence, and must vouch for his credibility, the effectiveness of the *res gestae* witness rule is curtailed. The accused will have gained no more from the imposition of the *res gestae* witness rule than the shifting to the prosecutor of the burden of locating and securing the attendance of witnesses. A more reasonable interpretation of the scope of cross-examination in light of the *res gestae* witness rule is found in the reasons for imposing the rule and the general tenor of Michigan cases. The rule is imposed (1) to avoid suppression of evidence favorable to the accused and (2) to protect the accused against a false accusation by giving him the opportunity through cross-examination to elicit exculpatory evidence.<sup>84</sup> Apparently the court intends that the accused shall have the tools of cross-examination at his disposal, *i.e.*, that he should be relieved of the procedural handicaps encountered by the party who calls the witness to the stand, and that he should be allowed to ask leading questions.<sup>85</sup> The *res gestae* witness rule would seem to require

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83. *People v. Lummis*, 260 Mich. 170, 244 N.W. 438 (1932). The witnesses in question had been endorsed on the information and were called by the prosecutor at the defendant's request. The prosecutor then turned the witnesses over to the defense, without examining them. The trial court ruled that in questioning the witnesses the accused made them his witnesses. Two judges held, on appeal, that the ruling was correct. Three others said that the trial court's ruling was erroneous but not prejudicial. Three other judges felt the conviction should be reversed on other grounds and did not specifically deal with this problem in their opinion. It is significant that the court failed to decide specifically whether the witnesses were in fact *res gestae* witnesses. If they were not, then there would be no reason to depart from the principle that in questioning a witness on matters not brought out by the opponent he becomes the witness of the party eliciting the evidence. See McCORMICK, EVIDENCE § 38 n.5 (1954).

84. *E.g.*, *People v. Kayne*, 268 Mich. 186, 255 N.W. 758 (1934); *People v. Raider*, 256 Mich. 131, 239 N.W. 387 (1931).

85. See, *e.g.*, *People v. Raider*, *supra* note 84; *People v. Hughes*, 116 Mich. 80, 74 N.W. 309 (1898); *People v. Deitz*, 86 Mich. 419, 49 N.W. 296 (1891). The most logical interpretation of the principle of the cases is that the accused may examine the

that the accused be allowed to deal with the witness as though he were a witness for the prosecutor. In light of the latitude accorded the prosecutor, presumably to place him on an even footing with the accused in dealing with the witness he is required to call, any other interpretation would seem unwarranted.

### B. *Scope of The Affirmative Duty in Other Jurisdictions*

Because of the lack of a large body of case law outside Michigan, it is difficult to define the extent of the duty in other jurisdictions. The courts, in enunciating an affirmative duty, take one of five approaches.

#### 1. *Requiring the Calling of All Witnesses Possessing Any Evidence of the Crime*

Broad statements of a duty are found in Vermont<sup>86</sup> and Connecticut<sup>87</sup> cases indicating that the prosecutor is under a duty to call all witnesses who can shed light on the guilt or innocence of the accused. This would seem to require the calling of a broad spectrum of witnesses in homicide, felony or even misdemeanor cases, and, in effect, to relieve the accused from calling any witnesses in the case. However, the statements must be taken at less than face value in light of decisions holding that the failure to comply with this duty is not in itself grounds for reversal of a conviction.<sup>88</sup> The cases indicate that the prosecutor need not call witnesses whose testimony will be cumulative,<sup>89</sup> and a Vermont case stated that the court would not require the calling of a witness of particularly bad character.<sup>90</sup> Therefore, while the duty, on its face, would seem to be broader in these two states than in Michigan, the lack of any sanctions against the prosecutor for failure to comply leaves considerable doubt as to whether the rule rises much above a statement of ethics.

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witness on any point and may treat him as though he were cross-examining him, that is he may ask leading questions and impeach him.

86. *State v. Teitle*, 117 Vt. 190, 90 A.2d 562 (1952); *State v. Searles*, 108 Vt. 236, 184 Atl. 701 (1936); *State v. Slack*, 69 Vt. 486, 38 Atl. 311 (1897); *State v. Harrison*, 66 Vt. 523, 29 Atl. 807 (1894); *State v. Magoon*, 50 Vt. 330 (1877).

87. *State v. Zimmaruk*, 128 Conn. 124, 20 A.2d 613 (1941); *State v. Jacowitz*, 128 Conn. 40, 20 A.2d 470 (1941); *State v. Guilfoyle*, 109 Conn. 124, 145 Atl. 761 (1929); *State v. Dayton*, 23 Conn. Supp. 272, 181 A.2d 274 (App. Div. 1962).

88. See *State v. Smith*, 71 Vt. 331, 45 Atl. 219 (1899); *State v. Roberts*, 63 Vt. 139, 21 Atl. 424 (1891); *State v. Dayton*, *supra* note 87. The *Smith* case indicates that an inference arises against a party failing to call a witness peculiarly within his control. The *Roberts* case indicates that the failure must result in violation of a legal right of the accused.

89. See *State v. Roberts*, *supra* note 88; *State v. Dayton*, *supra* note 87.

90. See *State v. Roberts*, *supra* note 88 (witness so disreputable that calling him would be a farce).

## 2. *Requiring the Calling of Witnesses Possessing the Most Direct Evidence*

In Montana the prosecutor cannot resort to circumstantial evidence in a felony case when there are witnesses available who can give direct evidence concerning the crime.<sup>91</sup> He has been required to call some eyewitnesses to a felony.<sup>92</sup> The question of whether the entire *res gestae* has been presented is only a consideration in determining whether the prosecutor should be required to do more after fulfilling the initial burden of presenting the most direct evidence.<sup>93</sup> Sanctions are applied in this state; the failure to comply with these requirements has caused reversals of convictions.<sup>94</sup> Therefore, in actual practice, the rule may come closest to approximating the law of Michigan in that a broad spectrum of witnesses fall within the purview of the rule.<sup>95</sup> However, it lacks the force of the Michigan rule. Montana requires only that some of the witnesses who possess the most direct evidence be placed on the stand, while Michigan requires the calling of an important witness whether or not others with as direct evidence have been called.<sup>96</sup> It should be noted, however, that the prosecutor in Montana is apparently required to examine the witnesses that he calls,<sup>97</sup> while the prosecutor in

91. *State v. Metcalf*, 17 Mont. 417, 43 Pac. 182 (1896); *State v. Vandervoort*, 57 Mont. 540, 189 Pac. 764 (1920) (dictum); *State v. Rolla*, 21 Mont. 582, 55 Pac. 523 (1898) (dictum).

92. See *State v. Inich*, 55 Mont. 1, 173 Pac. 230 (1918); *State v. Rolla*, *supra* note 91; *State v. Bloor*, 20 Mont. 574, 52 Pac. 611 (1898). The duty does not extend to misdemeanor cases. *State v. Parr*, 129 Mont. 175, 283 P.2d 1086 (1955).

The prosecutor was relieved of the duty to call all eyewitnesses to a homicide by MONT. REV. CODES ANN. 94-7213 (1947), which provides: "Upon a trial for murder or manslaughter it is not necessary for the state to call as witnesses all persons who are shown to have been present at the homicide, but the court may require all of such witnesses to be sworn and examined." The statute was first cited in *State v. Rolla*, *supra* note 91, as Pen. Code § 2082 (1895). This is apparently the only instance in which legislative enactment has played any part in establishing or limiting the duty of the prosecutor to call witnesses whose testimony may be of assistance to the accused in establishing his innocence.

93. See *State v. Rolla*, *supra* note 91.

94. *State v. Metcalf*, 17 Mont. 417, 43 Pac. 182 (1896) (heard shot but did not see the murder). In *Territory v. Hanna*, 5 Mont. 248, 5 Pac. 250 (1884) the court reversed a conviction for failure to call an eyewitness to a homicide.

95. See *State v. Inich*, 55 Mont. 1, 173 Pac. 230 (1918) (some eyewitnesses to a homicide); *State v. Metcalf*, *supra* note 94. Obviously the type of witnesses to be called depends upon the evidence available. If there are no eyewitnesses, a person who heard the crime committed must be called, as in the *Metcalf* case. Presumably, if no witness saw or heard the crime committed, it would be necessary to call one who saw a person fleeing from the scene. For the spectrum of witnesses to be called under the Michigan rule see text accompanying notes 41-47 *supra*.

96. Compare *State v. Inich*, *supra* note 95, with *People v. Castelli*, 370 Mich. 147, 121 N.W.2d 438 (1963).

97. See *State v. Metcalf*, 17 Mont. 417, 43 Pac. 182 (1896).

Michigan is not.<sup>98</sup> The prosecutor in Montana has been excused from calling an accomplice whom he believed would lie to protect the accused.<sup>99</sup>

### 3. *Requiring the Calling of some Eyewitnesses to a Homicide*

In Mississippi the prosecutor is held to a narrower duty than that imposed in Montana or Michigan in that he is required only to call some eyewitnesses to a homicide.<sup>100</sup> The trial court has the discretion to compel the prosecutor to call witnesses in trials of other felonies.<sup>101</sup> Sanctions, in the form of a reversal of the conviction, may follow a failure to comply with the duty.<sup>102</sup> The importance of the duty in this state is indicated by the refusal to excuse the prosecutor from calling an accomplice.<sup>103</sup>

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98. *People v. Hughes*, 116 Mich. 80, 74 N.W. 309 (1898); *People v. Deitz*, 86 Mich. 419, 49 N.W. 296 (1891); see *People v. Hossler*, 135 Mich. 384, 97 N.W. 754 (1904).

99. *State v. Vandervoort*, 57 Mont. 540, 189 Pac. 764 (1920). The court said that it would refuse to require the calling of an accomplice, jointly charged or not, if by false swearing he would injure the prosecutor's case. The witness was the brother of the accused.

The Montana Supreme Court has, however, shown reluctance to extend the range of exceptions. It required the prosecutor to call a witness he claimed was "stupidly drunk" at the time of the crime. *State v. Metcalf*, 17 Mont. 417, 43 Pac. 182 (1896).

100. *Ross v. State*, 185 Miss. 438, 188 So. 295 (1939); *Morrow v. State*, 57 Miss. 836 (1880); see *Mitchell v. State*, 171 Miss. 4, 156 So. 654 (1934); *Patty v. State*, 126 Miss. 94, 88 So. 498 (1921). Whether or not the prosecutor has presented the *res gestae* or whole transaction is a factor considered by the court in determining whether to require him to do more after he has satisfied his initial duty. *Mitchell v. State*, *supra*; see *Sullivan v. State*, 213 Miss. 14, 56 So. 2d 93 (1952).

101. See *Carlisle v. State*, 73 Miss. 387, 19 So. 207 (1896). The court's approach is similar to that taken in cases cited note 136 *infra*, dealing with those states which have no affirmative duty to call witnesses but give the trial court discretion to compel the prosecutor to call witnesses.

102. *Ross v. State*, 185 Miss. 438, 188 So. 295 (1939); *Mitchell v. State*, 171 Miss. 4, 156 So. 654 (1934); see *Patty v. State*, 126 Miss. 94, 88 So. 498 (1921).

A possible source of confusion in the reversals of some convictions in this state is the application to homicide cases of a peculiar best evidence rule. If the defendant and his witness were the only eyewitnesses to the homicide, their version of the incident must be taken as true unless it is materially contradicted by the physical facts or facts of common knowledge. *Lockridge v. State*, 172 So. 2d 192 (Miss. 1965); *Weathersby v. State*, 165 Miss. 207, 147 So. 481 (1933); *Patty v. State*, *supra*. In none of these cases did the accused request that the prosecutor call some witness. The *Patty* case, in which this best evidence rule was apparently formulated, illustrates the way the two rules actually seem to complement each other. The defendant, the deceased's wife, and another woman were present at the killing. The state proved its case by calling a witness who heard but did not see the shot, and by introducing a statement made by the defendant. The accused called the other woman to the stand and she corroborated his contention of self-defense. The court said that the failure of the state to call the deceased's wife was a circumstance favorable to the accused, and that his statements and those of his eyewitness must be taken as true. As in the other Mississippi cases, the court clearly indicated that the prosecutor should have called the eyewitness even though no request

#### 4. *Requiring the Prosecutor to Present the Res Gestae*

Cases in five jurisdictions, many decided near the turn of the century, state that the prosecutor is under a duty to present the entire *res gestae*.<sup>104</sup> They parallel the approach of early Michigan cases.<sup>105</sup> The fact that most of these statements are dicta, coupled with the lack of recent decisions in most of these jurisdictions, casts doubt on the continued vitality of the rule there.<sup>106</sup> The failure to comply with the duty apparently has not resulted in the application of a sanction in any of these jurisdictions.<sup>107</sup> Among the reasons recognized by these courts for excusing the calling of a witness were that he had proved himself unreliable,<sup>108</sup> that he had been unavailable,<sup>109</sup> and that his evidence would have been cumulative.<sup>110</sup>

#### 5. *Adopting the Michigan Rule*

Only one case has been found in which a court has adopted the Michigan rule. A federal district court in Alaska adopted the rule by way of dictum<sup>111</sup> in allowing the prosecutor to impeach a witness he had called to the stand.

None of the states imposing an affirmative duty to call witnesses requires

to do so had been made by the defendant. The court could have reversed on this ground and ordered a new trial. Instead, the reversal was based on the failure of the prosecutor to rebut the evidence of the defendant and his eyewitness. Since the state had failed to sustain its burden of proof, the conviction was dismissed.

103. *Mitchell v. State*, *supra* note 102 (the only eyewitness to a homicide). In a seduction case the court refused to require the calling of the victim, whom the court viewed as an accomplice. *Carlisle v. State*, 73 Miss. 387, 19 So. 207 (1896).

104. *E.g.*, *State v. Rice*, 7 Idaho 762, 66 Pac. 87 (1901); *Johnson v. State*, 88 Neb. 328, 129 N.W. 281 (1911); *State v. McGahey*, 3 N.D. 293, 55 N.W. 753 (1893); *State v. Kapelino*, 20 S.D. 591, 108 N.W. 335 (1906); *People v. Robinson*, 6 Utah 101, 21 Pac. 403 (1889); see *Texter v. State*, 170 Neb. 426, 102 N.W.2d 655 (1960).

105. *Strang v. People*, 24 Mich. 1, 10 (1871); *Patten v. People*, 18 Mich. 314, 327 (1869); *Brown v. People*, 17 Mich. 429, 433-34 (1868); *Maher v. People*, 10 Mich. 212, 226 (1862).

106. Cases cited note 104 *supra*.

107. See *State v. Bounds*, 74 Idaho 136, 258 P.2d 751 (1953); *State v. Allen*, 54 Idaho 459, 34 P.2d 45 (1934); *Plessman v. State*, 130 Neb. 758, 266 N.W. 629 (1936); *State v. Nuzum*, 58 S.D. 6, 234 N.W. 665 (1931).

108. *Argabright v. State*, 62 Neb. 402, 87 N.W. 146 (1901); see *State v. McGahey*, 3 N.D. 293, 55 N.W. 753 (1893).

109. *People v. Oliver*, 4 Utah 460, 11 Pac. 612 (1886).

110. See *State v. Bounds*, 74 Idaho 136, 258 P.2d 751 (1953); *Johnson v. State*, 88 Neb. 328, 129 N.W. 281 (1911); *State v. McGahey*, 3 N.D. 293, 55 N.W. 753 (1893); *State v. Nuzum*, 58 S.D. 6, 234 N.W. 665 (1931); *People v. Robinson*, 6 Utah 101, 21 Pac. 403 (1889). The exception for cumulative evidence is inherent in a rule which requires the prosecutor to present the *res gestae*. Obviously, once he has fulfilled the duty he is under no obligation to continue to repeat the process by calling additional witnesses who can add nothing new. See *Hurd v. People*, 25 Mich. 405 (1872).

111. *Meeks v. United States*, 179 F.2d 319 (9th Cir. 1950).

that witnesses endorsed on the information or indictment be called by the prosecutor,<sup>112</sup> except to the extent that the witness falls within the category of witnesses that must be called if his name were not endorsed.<sup>113</sup>

### C. *An Appraisal*

In Michigan, the duty places an important tactical tool in the hands of the accused by giving him the right to cross-examine witnesses he would otherwise have to call to the stand. This relieves him of procedural handicaps usually faced by a party calling a witness and presumably helps him to elicit evidence that might not otherwise come to light.<sup>114</sup> The tool is particularly effective when coupled with the companion rule that material evidence, which the prosecutor may have concealed from the defendant, will be treated as new evidence. Thus, even if the witness possessing the evidence was placed on the stand by the prosecutor, the conviction will be reversed if the material evidence is not introduced.<sup>115</sup> The fact that the prosecutor is allowed latitude in dealing with the witness he is compelled to call<sup>116</sup> mitigates any unfair advantage which the accused might otherwise realize from a shift in the roles of the opposing parties in the criminal trial. The *res gestae* witness rule can be criticized for being too nebulous to provide a usable guide to the prosecutor in determining which witnesses must be called.<sup>117</sup> On the other hand, this lack of certainty allows flexibility in administering the rule. The court has considerable discretion to compel or excuse the calling of the witness in light of the circumstances of the case.<sup>118</sup>

Despite its lack of certainty in application, the Michigan rule is preferable to a rigid rule which requires the calling of limited categories of witnesses,<sup>119</sup>

112. *E.g.*, State v. Allen, 54 Idaho 459, 34 P.2d 45 (1934); People v. Whitmore, 230 Mich. 435, 203 N.W. 87 (1925); State v. Russell, 13 Mont. 164, 32 Pac. 854 (1893); Bloom v. State, 95 Neb. 710, 146 N.W. 965 (1914); State v. Ave, 74 N.D. 242, 21 N.W.2d 352 (1946); see People v. Oliver, 4 Utah 460, 11 Pac. 612 (1886).

113. See, *e.g.*, State v. Rice, 7 Idaho 762, 66 Pac. 87 (1901); People v. Kayne, 268 Mich. 186, 255 N.W. 758 (1934); State v. Rolla, 21 Mont. 582, 55 Pac. 523 (1898); Johnson v. State, 88 Neb. 328, 129 N.W. 281 (1911); People v. Oliver, *supra* note 112.

114. See People v. Raider, 256 Mich. 131, 135, 239 N.W. 387, 389 (1931).

115. People v. Ake, 362 Mich. 134, 106 N.W.2d 800 (1961).

116. MICH. STAT. ANN. § 28.980(1) (1954).

117. Compare People v. Ake, 362 Mich. 134, 106 N.W.2d 800 (1961), with People v. Tann, 326 Mich. 361, 40 N.W.2d 184 (1949).

118. Compare People v. Castelli, 370 Mich. 147, 121 N.W.2d 438 (1963), and People v. Burnstein, 261 Mich. 534, 246 N.W. 217 (1933), and Thomas v. People, 39 Mich. 309 (1878), with People v. Ake, *supra* note 117, and People v. Kennan, 275 Mich. 452, 266 N.W. 468 (1936), and People v. Long, 44 Mich. 296, 6 N.W. 673 (1880).

119. In Mississippi the prosecutor must call some eyewitnesses to a homicide. Cases cited note 100 *supra*. At common law the prosecutor had a duty to call all eyewitnesses to felonies and all endorsed witnesses. Cases cited note 7 *supra*.

or a rule based on the directness of the evidence the witness can give.<sup>120</sup> The shortcoming of these latter rules is that they may exclude a witness who possesses more important exculpatory evidence than the witness whom the rule requires the prosecutor to call. Both lack the flexibility to meet the needs of the defendant in all cases.

A rule that places a duty on the prosecutor to introduce all the evidence establishing the guilt or innocence of the accused,<sup>121</sup> or that requires the prosecutor to call all witnesses who can shed any light on the case,<sup>122</sup> would work a fundamental change in the adversary nature of the criminal trial. Such a solution might seriously hamper the prosecutor in securing convictions of the guilty. The lack of sanctions in states espousing such rules leaves the adversary nature of the criminal trial intact and renders the rules little more than ethical guidelines for the prosecutor.<sup>123</sup>

Unlike Michigan, some states imposing an affirmative duty have failed to give the prosecutor a free hand in dealing with witnesses he is required to call.<sup>124</sup> Thus, in relieving the defendant of the procedural handicaps inherent in calling a witness the courts have merely shifted them to the prosecutor. The prosecutor who is required to place a witness on the stand whom he would not choose to call if he had a completely unrestricted discretion, should be allowed substantial latitude in dealing with the witness to insure

120. In Montana the prosecutor cannot use circumstantial evidence if witnesses are available who can give direct evidence. Cases cited notes 91-92 *supra*.

121. Scattered older decisions in several jurisdictions state that the prosecutor has a duty to present the entire criminal transaction. Cases cited note 104 *supra*.

122. In Connecticut and Vermont the cases contain statements suggesting the existence of a very broad duty to call all witnesses who can shed light on the question of guilt. Cases cited notes 86-87 *supra*.

123. In none of these states can decisions be found reversing convictions because of a failure to comply with these broad statements of duty. Cases cited notes 88, 107 *supra*.

124. *Connecticut*: The prosecutor may not impeach the witnesses he calls, but is free to introduce contradictory testimony and the jury is free to decide which version of the transaction is true. *State v. Guilfoyle*, 109 Conn. 124, 145 Atl. 761 (1929).

*Mississippi*: See *Dodd v. State*, 88 Miss. 50, 40 So. 545 (1906) (trial judge has discretion to allow latitude in handling); *Dunk v. State*, 84 Miss. 452, 36 So. 609 (1904) (prosecutor cannot contradict witness unless trapped into calling him); *Chism v. State*, 70 Miss. 742, 12 So. 852 (1893).

*Montana*: MONT. REV. CODES ANN. 93-1901-3 (1947), provides that the party calling a witness may not impeach him for bad character but may contradict him by other evidence or by showing that he has made inconsistent statements at other times. The prosecutor has been allowed to cross-examine witnesses whose testimony varied from that which the prosecutor had reason to believe he would give. *State v. Bloor*, 20 Mont. 574, 52 Pac. 611 (1898). The prosecutor also has been allowed to impeach hostile witnesses. *State v. Willette*, 46 Mont. 326, 127 Pac. 1013 (1912). *But see State v. Rolla*, 21 Mont. 582, 55 Pac. 523 (1898).

that a less than truthful witness will be exposed. Normally the opponent has this role, but it is evident that the accused will not attack the veracity of such a witness.

The existence of the duty, coupled with court decisions allowing the impeachment of witnesses the prosecutor is required to call,<sup>125</sup> actually works as an advantage to the prosecutor in Vermont. By contending that he is under a duty to call all witnesses who can shed light on the guilt or innocence of the accused, the prosecutor gains the privilege of being allowed to impeach the witness as though he had been called by the accused.<sup>126</sup> If these witnesses are in sympathy with the prosecutor, or would not have been inclined to favor the accused, the prosecutor has obtained an advantage to which he is not entitled. Apparently the prosecutor may disregard the duty when he does not wish to call a witness and the failure to do so will not result in reversal.<sup>127</sup>

## II. THE POSITION OF THE MAJORITY OF JURISDICTIONS

No affirmative duty to call witnesses has been recognized in the great majority of jurisdictions. However, judicial statements on this issue range from declarations that the prosecutor has absolute freedom in selecting witnesses to opinions emphasizing fairness or safeguards imposed to insure a fair trial. These opinions reflect each court's basic conception of the role of the prosecutor in the criminal trial. Those courts which view the prosecutor as a partisan advocate are unwilling to interfere with his discretion, while those viewing him as a minister of justice apply some safeguards, short of imposing an affirmative duty, to insure fairness to the accused.

At one extreme are the courts which emphasize the adversary nature of a trial, and view the prosecutor as a partisan advocate. These courts give the prosecutor a free hand in choosing and calling witnesses,<sup>128</sup> sometimes reject-

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125. *State v. Slack*, 69 Vt. 486, 38 Atl. 311 (1897) (can impeach the witness called); see *State v. LaBonte*, 120 Vt. 465, 144 A.2d 792 (1958). The *LaBonte* case stated that the prosecutor is not bound by the evidence he introduces and may bring forth other evidence contradicting it.

126. *State v. Slack*, *supra* note 125.

127. See *State v. Smith*, 71 Vt. 331, 45 Atl. 219 (1899); *State v. Roberts*, 63 Vt. 139, 21 Atl. 424 (1891).

128. *Arizona*: *Halderman v. Territory*, 7 Ariz. 120, 60 Pac. 876 (1900); see *State v. Jordan*, 83 Ariz. 248, 320 P.2d 446 (1958).

*Georgia*: See *Harper v. State*, 131 Ga. 771, 63 S.E. 339 (1909); *Greeson v. State*, 97 Ga. App. 245, 102 S.E.2d 503 (1958); *Cole v. State*, 86 Ga. App. 770, 72 S.E.2d 537 (1952); *Lee v. State*, 2 Ga. App. 481, 58 S.E. 676 (1907).

*Louisiana*: The court has rejected any duty to call all eyewitnesses to a homicide. *State v. Wiebelt*, 166 La. 836, 118 So. 38 (1928); *State v. Williams*, 30 La. Ann. 842 (1878). There is no requirement that all those announced as state witnesses be called. See *State v. McKee*, 170 La. 630, 128 So. 658 (1930). Also, there is no duty that those subpoenaed

ing any authority in the trial judge to interfere in any way.<sup>129</sup> Older opinions indicate that it is possible for the prosecutor to go too far and abuse his discretion,<sup>130</sup> and one allows the jury to draw inferences against the prosecutor from his failure to call a witness.<sup>131</sup>

Six state courts, while rejecting the common law duty to call all eyewitnesses or all witnesses endorsed on the indictment or information,<sup>132</sup> have not indicated whether they give the prosecutor absolute discretion, or require the calling of some witnesses in certain situations.

A large group of courts, while giving a very broad discretion to the prosecutor, add language indicating their cognizance of an outer limit on this discretion. These limits are usually couched in terms of a general prohibition of suppression of evidence,<sup>133</sup> or a requirement that the prosecutor not act

by the prosecutor be called. *State v. Stickney*, 167 La. 1050, 120 So. 853 (1929). The prosecuting officer need only call those witnesses he deems necessary to prove his case. *State v. Nejin*, 140 La. 793, 74 So. 103 (1917); *cf.* *State v. Jones*, 233 La. 775, 98 So. 2d 185 (1957).

*Massachusetts*: A prosecuting officer is violating no canon of legal ethics in presenting evidence which tends to show guilt, while failing to call witnesses, in whom he has no confidence, whose testimony contradicts what he is trying to prove. *Commonwealth v. Sacco*, 259 Mass. 128, 141, 156 N.E. 57, 61, *cert. denied*, 275 U.S. 574 (1927); see *Commonwealth v. Cox*, 327 Mass. 609, 100 N.E.2d 14 (1951); *Commonwealth v. Haskell*, 140 Mass. 128, 2 N.E. 773 (1885).

*North Carolina*: *State v. Terry*, 173 N.C. 761, 92 S.E. 154 (1917); *State v. Lucas*, 124 N.C. 825, 32 S.E. 962 (1899); *State v. Martin*, 24 N.C. 101 (1841).

*Texas*: *E.g.*, *Keeton v. State*, 132 Tex. Crim. 644, 106 S.W.2d 719 (1937) (no duty to call victim); *Berrian v. State*, 85 Tex. Crim. 367, 212 S.W. 509 (1919) (not bound to call any or all eyewitnesses to homicide); see *Scott v. State*, 19 Tex. Ct. App. R. 325 (1885).

*West Virginia*: *State v. Cain*, 20 W. Va. 679 (1882).

129. *Halderman v. Territory*, *supra* note 128; *State v. Martin*, *supra* note 128; *State v. Cain*, *supra* note 128.

130. See *State v. Baxter*, 82 N.C. 602 (1880).

131. *State v. Smallwood*, 75 N.C. 104 (1876). *Contra*, *State v. Nejin*, 140 La. 793, 74 So. 103 (1917).

132. *Alabama*: See *Mann v. State*, 134 Ala. 1, 32 So. 704 (1902).

*Kentucky*: *Porter v. Commonwealth*, 145 Ky. 548, 140 S.W. 643 (1911).

*Maryland*: *Franklin v. State*, 239 Md. 645, 212 A.2d 279 (1965); *Matthews v. State*, 237 Md. 384, 206 A.2d 714 (1965).

*Nevada*: *State v. Milosovich*, 42 Nev. 263, 175 Pac. 139 (1918).

*Oklahoma*: *Hood v. State*, 80 Okla. Crim. 175, 157 P.2d 918 (1945); *Abrams v. State*, 49 Okla. Crim. 376, 293 Pac. 1116 (1930); *Pollock v. State*, 26 Okla. Crim. 196, 223 Pac. 210 (1924).

*South Carolina*: *State v. Clark*, 4 Strob. 311 (1850) (dissent on *res gestae* by two judges).

133. *Indiana*: The prosecutor must only refrain from doing anything that will deprive the accused of testimony to which he is rightfully entitled. *Keller v. State*, 123 Ind.

unfairly.<sup>134</sup> A few jurisdictions single out fraud or trickery on the part of the prosecutor for condemnation, emphasizing that he should never knowingly seek the conviction of an innocent man.<sup>135</sup>

110, 23 N.E. 1138 (1890). There is no duty to call all eyewitnesses, *Winsett v. State*, 57 Ind. 26 (1877).

*New York*: *People v. Fisher*, 23 Misc. 2d 391, 192 N.Y.S.2d 741 (N.Y. County Ct. 1958), and *People v. Hoffner*, 208 Misc. 117, 129 N.Y.S.2d 833 (Queens County Ct. 1952), suggest that there is only a duty not to suppress evidence. However, *People v. Riley*, 191 Misc. 888, 83 N.Y.S.2d 281 (Kings County Ct. 1948), indicates that the prosecutor is under a duty to present all the material evidence of which he may become possessed. That rule is reiterated in *People v. Buckley*, 44 Misc. 2d 403, 253 N.Y.S.2d 967 (Eric County Ct. 1964) (dictum). Early court cases had held that the prosecutor was under no duty to call all witnesses endorsed on the indictment or all eyewitnesses to the crime. *People v. Goldberg*, 125 App. Div. 429, 109 N.Y.S. 906 (1908); *People v. Fitzpatrick*, 5 Parker's N.Y. Crim. 26 (Sup. Ct. 1857).

*Oregon*: In *State v. Barrett*, 33 Ore. 194, 54 Pac. 807 (1898), the court said that if the prosecutor tries to suppress evidence the trial judge should require him to bring it forth even though adverse to the state. Refusal to do this would be grounds for reversal. In a later case, *State v. Sing*, 114 Ore. 267, 229 Pac. 921 (1924), the court said there was no duty to call a witness endorsed on the indictment.

*Wyoming*: In *Ross v. State*, 8 Wyo. 351, 57 Pac. 924 (1899), the court said that it might become the duty of the trial court to force the prosecutor to call a witness if there were any attempt by the prosecutor to prejudice the accused by suppression of testimony. The case specifically repudiates the common-law duty of calling all eyewitnesses.

134. *California*: *E.g.*, *People v. Tuthill*, 31 Cal. 2d 92, 187 P.2d 16 (1947), *cert. denied*, 335 U.S. 846 (1948); *People v. Larrios*, 220 Cal. 236, 30 P.2d 404 (1934) (prosecutor not required to call party he will not vouch for); *People v. Ruiz*, 228 Cal. App. 2d 703, 39 Cal. Rptr. 641 (Dist. Ct. App. 1964).

*Colorado*: *Ware v. People*, 76 Colo. 38, 230 Pac. 123 (1924) (prosecutor need only act in good faith). The prosecutor has discretion in calling witnesses. See, *e.g.*, *Warren v. People*, 121 Colo. 118, 213 P.2d 381 (1949); *Militello v. People*, 95 Colo. 519, 37 P.2d 527 (1934).

*Missouri*: The state is under no obligation to place any person on the witness stand, but the prosecutor is not at liberty to act in a way fundamentally unfair to the accused. *State v. Eaton*, 302 S.W.2d 866 (Mo. 1957), *cert. denied*, 355 U.S. 912 (1958). The state does not have to call all eyewitnesses to a murder. *E.g.*, *State v. Kinne*, 372 S.W.2d 62 (Mo. 1963); *State v. David*, 131 Mo. 380, 33 S.W. 28 (1895).

*New Mexico*: *Thomason v. Territory*, 4 N.M. (4 Gild., E.W.S. ed.) 150, 13 Pac. 223 (1887).

135. *Iowa*: There is no affirmative duty on the prosecutor to call witnesses, only a negative duty requiring him not purposely to omit to prove any fact in a homicide. See *State v. Christ*, 189 Iowa 474, 177 N.W. 54 (1920). Nor may he knowingly ask the conviction of an innocent man. *State v. Dillon*, 74 Iowa 653, 38 N.W. 525 (1888).

*Kansas*: The prosecutor must only perform his duty fairly and not seek to convict an innocent man. This means that he may not conceal facts which would establish the accused's innocence or employ trickery to convict anyone. *State v. Campbell*, 73 Kan. 688, 720, 85 Pac. 784, 795 (1906).

*Tennessee*: The prosecutor should not be forced to introduce any particular witness in presenting his case, but the trial court can compel calling if a trick or fraud has been practiced or if the prosecutor has prevented access to testimony favorable to the accused. *Eason v. State*, 65 Tenn. (6 Baxter) 431 (1873) (dictum).

A few courts appear to approach the imposition of an affirmative duty in stating that the trial judge has discretionary power to require the prosecutor to call certain witnesses.<sup>136</sup> This position has been most fully developed in Pennsylvania. The general rule in that state is that the district attorney has discretion in calling witnesses subject to the general supervision of the trial judge.<sup>137</sup> Thus, the trial judge may compel the prosecutor to call a witness.<sup>138</sup> However, the potential power of the trial judge appears to have been blunted by the holding that the prosecutor may withhold testimony if he can establish any reason for withholding the testimony other than that it is favorable to the accused.<sup>139</sup> For example, the prosecutor need only allege that the witness' testimony would be unworthy of belief to relieve himself of any duty.<sup>140</sup> In practice, the state supreme court requires no more than that the prosecutor notify the defendant that he will not call the witness so that the defendant may do so.<sup>141</sup> No case could be found reversing a conviction for failure to call a witness.<sup>142</sup>

Though the statements of many of the courts which do not impose an affirmative duty suggest that their views are not far removed from Michi-

136. *United States v. Guertler*, 147 F.2d 796 (2d Cir.) (court required prosecutor to call; defendant complains on appeal), *cert. denied*, 325 U.S. 879 (1945); *Commonwealth v. Keller*, 191 Pa. 122, 43 Atl. 198 (1899); *State v. Payne*, 10 Wash. 545, 39 Pac. 157 (1895); *Dillon v. State*, 137 Wis. 655, 119 N.W. 352 (1909).

137. *E.g.*, *Commonwealth v. Palermo*, 368 Pa. 28, 81 A.2d 540 (1951); *Commonwealth v. Taraborelli*, 202 Pa. Super. 356, 195 A.2d 888 (1963).

138. *Commonwealth v. Zec*, 262 Pa. 251, 105 Atl. 279 (1918); *accord*, *Commonwealth v. Keller*, 191 Pa. 122, 43 Atl. 198 (1899); see *Commonwealth v. Gockley*, 411 Pa. 437, 192 A.2d 693 (1963); *Donaldson v. Commonwealth*, 95 Pa. 21 (1880); *Commonwealth v. Sarkis*, 164 Pa. Super. 194, 63 A.2d 360 (1949). In such a case, the prosecutor would be allowed to impeach the witness. *Commonwealth v. Deitrick*, 221 Pa. 7, 70 Atl. 275 (1908); *cf.* *Commonwealth v. Sarkis*, *supra* (not bound by the testimony of such a witness).

139. *Commonwealth v. Deitrick*, *supra* note 138; see *Commonwealth ex rel. Haines v. Banmiller*, 13 Pa. D. & C.2d 57 (C.P.), *aff'd per curiam*, 393 Pa. 439, 143 A.2d 661, *cert. denied*, 358 U.S. 868 (1958).

140. *E.g.*, *Commonwealth v. Horn*, 395 Pa. 585, 150 A.2d 872 (1959); *Commonwealth v. Francis*, 201 Pa. Super. 313, 191 A.2d 884 (1963), *cert. denied*, 375 U.S. 985 (1964).

141. *Commonwealth v. Horn*, *supra* note 140; *Commonwealth v. Deitrick*, 221 Pa. 7, 70 Atl. 275 (1908); *Commonwealth v. Danz*, 211 Pa. 507, 60 Atl. 1070 (1905). Lower court decisions add the further requirement, in dicta, that the prosecutor have the witness in court. *Commonwealth v. Cramer*, 168 Pa. Super. 1, 76 A.2d 661 (1950); *Commonwealth v. Sarkis*, 164 Pa. Super. 194, 63 A.2d 360 (1949).

142. In one case, the trial judge had required the calling of a witness. The court held that this decision was not reviewable except for an abuse of discretion. *Commonwealth v. Sarkis*, *supra* note 141. In another case, reversal followed a failure to produce, rather than call, the witness. *Commonwealth v. Cramer*, *supra* note 141. See generally Note, 25 *TEMP. L.Q.* 344 (1952).

gan's, the cases indicate that these courts simply do not reverse convictions to require the calling of witnesses. In the few cases which did result in reversals, the failure to call was only one of the factors which contributed to the court's determination that the constitutional rights of the accused had been violated.<sup>143</sup>

### III. ATTEMPTS TO ESTABLISH CONSTITUTIONAL BASES FOR THE DUTY TO CALL WITNESSES.

In recent years, defense attorneys have attempted to found the prosecutor's duty to call witnesses on constitutional grounds through expansion of the right of confrontation and the due process limits on suppression of evidence.

#### A. *The Right of Confrontation*

While the sixth amendment to the United States Constitution guarantees a defendant in a criminal trial the right to be confronted by the witnesses against him, attempts to read into this right a duty on the part of the prosecutor to call certain witnesses have been uniformly unsuccessful.<sup>144</sup> The claim has arisen in cases in which the witness in question was an informer,<sup>145</sup> was called by the prosecutor at a previous trial of the case but not at the later trial,<sup>146</sup> was endorsed on the information or indictment,<sup>147</sup> or was the

143. United States *ex rel.* Thompson v. Dye, 221 F.2d 763 (3d Cir. 1955); United States *ex rel.* Montgomery v. Ragen, 86 F. Supp. 382 (N.D. Ill. 1949); People v. Riley, 191 Misc. 888, 83 N.Y.S.2d 281 (Kings County Ct. 1948); see United States v. Ramsey, 220 F. Supp. 86 (E.D. Tenn. 1963); Application of Kapatos, 208 F. Supp. 883 (S.D.N.Y. 1962). For a full discussion of these cases see notes 152-57 *infra* and accompanying text.

144. *E.g.*, Eberhart v. United States, 262 F.2d 421 (9th Cir. 1958); Curtis v. Rives, 123 F.2d 936 (D.C. Cir. 1941); State v. Jordan, 83 Ariz. 248, 320 P.2d 446 (1958); People v. Smith, 174 Cal. App. 2d 129, 344 P.2d 435 (Dist. Ct. App. 1959); People v. Taylor, 159 Cal. App. 2d 752, 324 P.2d 715 (Dist. Ct. App. 1958); Denton v. State, 203 N.E.2d 539 (Ind. 1965); State v. Romero, 69 N.M. 187, 365 P.2d 58 (1961); State *ex rel.* Byrd v. Bomar, 214 Tenn. 476, 381 S.W.2d 280 (1964).

145. Eberhart v. United States, *supra* note 144; People v. Smith, *supra* note 144; People v. Taylor, *supra* note 144.

The Taylor case is the most striking example of the courts' unwillingness to extend the doctrine. The informer there was given \$10 by the police, searched thoroughly, then closely watched as he entered and left the accused's car. He was again searched; the money was missing and narcotics were found in his possession. The defendant was then taken into custody. The case rested entirely on circumstantial evidence, since the prosecutor did not call the informer. The court said the failure to call the informer was not an infringement of the right to confrontation.

It is interesting to note that in *Smith* and in *People v. Lollis*, 177 Cal. App. 2d 665, 2 Cal. Rptr. 420 (Dist. Ct. App. 1960), the same informer is involved. In the *Lollis* case the defendant secured two continuances in an attempt to find him.

146. Curtis v. Rives, 123 F.2d 936 (D.C. Cir. 1941); State v. Jordan, 83 Ariz. 248, 320 P.2d 446 (1958).

147. State v. Jordan, *supra* note 146; Greeson v. State, 97 Ga. App. 245, 102 S.E.2d

victim.<sup>148</sup> It would seem that the argument that the right of confrontation requires that the witness be called has much force when the witness has been endorsed as having appeared before the grand jury, or has played a material role in gathering the evidence. In such a case, it is logical to assume that his testimony played a part in the decision to return an indictment or initiate prosecution. Thus, he has been, in a very real sense, a witness against the accused, and the failure to call him could arguably deny the accused the right to be confronted by him. However, the right to confrontation has been interpreted as essentially a safeguard against hearsay evidence. It safeguards the right of cross-examination, but does not require the calling of any particular witness.<sup>149</sup> Apparently, confrontation does not restrict the prosecutor's discretion in deciding what evidence he will use to satisfy the burden of proving the accused's guilt except in restraining him from using hearsay evidence. Consequently, the prosecutor may decide not to introduce certain evidence and therefore will have no constitutional obligation to call the witness who possesses it.

Another argument for basing a duty to call on confrontation grounds stems from United States Supreme Court decisions requiring that the prosecutor disclose the name of an informer who has played a material part in gathering evidence against the accused.<sup>150</sup> A number of California decisions deal with attempts by the accused to enlarge this duty by interpreting the right of confrontation as compelling the prosecutor to call the informer to the stand.<sup>151</sup> These attempts have been uniformly unsuccessful.

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503 (1958); *Denton v. State*, 203 N.E.2d 539 (Ind. 1965); *Hood v. State*, 80 Okla. Crim. 175, 157 P.2d 918 (1945); *State ex rel. Byrd v. Bomar*, 214 Tenn. 476, 381 S.W.2d 280 (1964).

A charge by an accused that the failure of the prosecutor to call witnesses designated as prosecution witnesses caused unfair surprise has also been rejected. See *Robinson v. United States*, 128 F.2d 322 (D.C. Cir. 1942).

148. *Commonwealth ex rel. Jones v. Myers*, 201 Pa. Super. 437, 193 A.2d 629 (1963); see *Curtis v. Rives*, 123 F.2d 936 (D.C. Cir. 1941).

149. *Curtis v. Rives*, *supra* note 148; see *State v. Jordan*, 83 Ariz. 248, 320 P.2d 446 (1958).

150. See *Rugendorf v. United States*, 376 U.S. 528 (1964); *Roviaro v. United States*, 353 U.S. 53 (1957).

151. A detailed discussion of situations in which the prosecutor will be required to disclose the name of an informer is beyond the scope of this note. Therefore, no attempt is made to determine whether the court was correct in requiring or refusing to require the disclosure of the name of the informer in a given case. All attempts at extension of the duty to require the calling of witnesses have met with failure. *E.g.*, *People v. Smith*, 174 Cal. App. 2d 129, 344 P.2d 435 (Dist. Ct. App. 1959); *People v. Alexander*, 168 Cal. App. 2d 753, 336 P.2d 565 (Dist. Ct. App. 1959).

In *Smith*, the court said that the rule requiring disclosure of the identity of the informant was aimed at giving the accused an opportunity to uncover facts relating to the

B. *Due Process*

Defendants have argued that a prosecutor's failure to disclose material evidence and his concomitant failure to call a witness possessing such evidence constitutes a denial of due process of law.<sup>152</sup> In *Application of Kapatos*<sup>153</sup> the prosecutor failed to disclose to the accused that an individual had seen two men flee from the murder scene and that the individual would testify that neither of the men was the accused. Similarly, in *People v. Riley*<sup>154</sup> the prosecutor failed to disclose the existence of or call an expert handwriting witness who was prepared to testify that in his opinion an allegedly forged signature was genuine. In both cases the convictions were reversed because of the conduct of the prosecutor; however the duties imposed upon the prosecutor differed. In *Kapatos* the court would have been satisfied with disclosure, but in the *Riley* case the New York court said that the prosecutor should call the witness to the stand.<sup>155</sup> Read in the light of subsequent New York decisions,<sup>156</sup> it is arguable that no more would be required today than that the evidence be disclosed to the accused. The court is less concerned with imposing a duty to call witnesses on the prosecutor than with remedying a suppression of evidence. Aside from the *Kapatos* case, *Riley* and the other cases in which suppression resulted from a failure to disclose the existence of a witness or the evidence he could give involved some reprehensible conduct in addition to the failure to call the witness to the stand.<sup>157</sup> The violation of due process, the suppression of evidence, may

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informers' participation, permitting an independent investigation of the information given to the officers by the informant and allowing the accused to interview, subpoena and call the informant himself. *People v. Smith*, *supra* at 133, 344 P.2d at 438. Even requiring the prosecutor to produce the informer has been held to be an unreasonable extension of the rule. *People v. Alexander*, *supra* at 755, 336 P.2d at 566.

152. The question of whether the prosecutor must call a witness to the stand to avoid a reversal for suppression of evidence is most clearly posed when the exculpatory evidence is purely testimonial in character.

153. 208 F. Supp. 883 (S.D.N.Y. 1962).

154. 191 Misc. 888, 83 N.Y.S.2d 281 (Kings County Ct. 1948).

155. *People v. Riley*, 191 Misc. 888, 83 N.Y.S.2d 281 (Kings County Ct. 1948) held that it is the duty of the prosecutor to present to the trial jury all the material evidence of which he may become possessed. *Id.* at 892, 83 N.Y.S.2d at 284; *accord*, *People v. Buckley*, 44 Misc. 2d 403, 253 N.Y.S.2d 967 (Erie County Ct. 1964) (dictum).

156. *People v. Fischer*, 23 Misc. 2d 391, 192 N.Y.S.2d 741 (N.Y. County Ct. 1958); *People v. Hoffner*, 208 Misc. 117, 129 N.Y.S.2d 833 (Queens County Ct. 1952). These cases suggest that there is only a duty not to suppress evidence. This would seem to require no more than disclosure of the evidence to the accused.

157. *United States ex rel. Thompson v. Dye*, 221 F.2d 763 (3d Cir. 1955); *United States ex rel. Montgomery v. Ragen*, 86 F. Supp. 382 (N.D. Ill. 1949); *People v. Riley*, 191 Misc. 888, 83 N.Y.S.2d 281 (Kings County Ct. 1948); see *United States ex rel. Almeida v. Baldi*, 104 F. Supp. 321 (E.D. Pa. 1951), *aff'd*, 195 F.2d 815 (3d Cir. 1952), *cert. denied*, 345 U.S. 904 (1953).

be rectified solely by the disclosure of the witness and the evidence that he possesses without any imposition of duty to call.

Courts have generally been unwilling to impose a duty on the prosecutor to call witnesses on constitutional grounds. Since the common law affirmative duty is of long standing, and courts have long since taken stands on the issue, it is unlikely that there will be any revolution of thinking. Therefore, any possibility of extending the duty into states currently failing to recognize an affirmative duty would seem to lie in the extent to which the courts are willing to recognize an infringement of constitutional rights in the failure to call a given witness to the stand.

#### CONCLUSION

While many courts,<sup>158</sup> the American Bar Association,<sup>159</sup> and legal scholars<sup>160</sup> view the prosecutor as a minister of justice rather than a partisan advocate, only a small minority of jurisdictions have imposed an affirmative duty to call witnesses. The explanation seems to lie in a general reluctance to disturb the fundamental adversary character of the criminal trial. The courts apparently feel that some less drastic cure will satisfactorily deal with the dangers of suppression and unfairness.

Is there a need or justification for imposing a duty on the prosecutor today? The answer lies in striking a balance between insuring a fair trial to the accused and enabling the prosecutor to secure conviction of the guilty. Forcing the prosecutor to call witnesses whose testimony will be helpful to the accused and presumably harmful to the prosecutor's case is a major

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In the *Riley* case, the prosecutor told an expert handwriting witness to leave unseen by the accused. In the *Thompson* case, the prosecutor failed to disclose the existence of or call a police officer who would have testified that the accused appeared to be drunk, a fact that presumably would have destroyed the intent necessary for first degree murder. The failure was compounded by the prosecutor's statement in court that any further testimony would be cumulative. In the *Montgomery* case, the prosecutor failed to call or disclose the existence of a doctor who had examined the alleged victim of a rape and who would have testified that no sexual assault took place. The prosecutor had also intimidated the accused and his counsel so that an adequate defense had not been presented. In all of these cases the emphasis was on the conduct of the prosecutor.

158. *E.g.*, *State v. Guilfoyle*, 109 Conn. 124, 145 Atl. 761 (1929); *Hurd v. People*, 25 Mich. 405 (1872); *State v. Smith*, 78 Minn. 362, 81 N.W. 17 (1899); *State v. Eaton*, 75 Mo. 586 (1882); *State v. Magoon*, 50 Vt. 333 (1877).

159. "The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible." Canon 5, ABA, CANONS OF PROFESSIONAL ETHICS.

160. Wright, *Duties of a Prosecutor*, 33 CONN. B.J. 293 (1959); Humphreys, *The Duties of Prosecuting Counsel*, 1955 CRIM. L. REV. (Eng.) 739; Conboy, *The Obligations of a Prosecuting Attorney*, 69 U.S.L. REV. 309 (1935).

modification of the adversary system. It is submitted that such a duty should not be imposed unless compelling reasons are found for doing so.

The major reasons cited by courts in forcing the prosecutor to call witnesses are: (1) to avoid suppression or concealment of exculpatory evidence,<sup>161</sup> and (2) to avoid the unfairness to the accused that may result if he is forced to call a witness.<sup>162</sup> This unfairness results from the procedural and inherent handicaps that a litigant may face when he calls a witness.<sup>163</sup>

It is doubtful whether forcing the prosecutor to call a witness who possesses exculpatory evidence, without also requiring disclosure of the evidence which the witness possesses, serves as any meaningful protection against concealment or suppression of evidence.<sup>164</sup> However, even in cases where the character of the witness would give notice of the evidence he possessed,<sup>165</sup> it would appear that a disclosure both of the existence of the witness and of the evidence he possessed would be a more adequate safeguard. The fields of disclosure and suppression are in a state of flux, and some writers have expressed the opinion that the law is developing in the direction of requiring the prosecutor to disclose all exculpatory evidence to the accused.<sup>166</sup> Thus, it seems that the avoidance of concealment of evidence is vanishing as a reason for the imposition of a duty to call witnesses.

161. *People v. Tann*, 326 Mich. 361, 40 N.W.2d 184 (1949); *People v. Raider*, 256 Mich. 131, 329 N.W. 387 (1931); *People v. Kindra*, 102 Mich. 147, 60 N.W. 458 (1894); see *People v. Riley*, 191 Misc. 888, 83 N.Y.S.2d 281 (Kings County Ct. 1948).

162. See *Lopez v. United States*, 373 U.S. 427, 445 (1963) (concurring opinion); *United States v. Ramsey*, 220 F. Supp. 86 (E.D. Tenn. 1963); *People v. Raider*, *supra* note 161.

163. See notes 167-70 *infra* and accompanying text.

164. See *People v. Ake*, 362 Mich. 134, 106 N.W.2d 800 (1961). A deputy sheriff was called to the stand by the prosecutor but the defendant failed to elicit the exculpatory evidence he possessed because he was unaware of its existence. However, the court reversed the conviction on grounds of newly discovered evidence. It is evident that without this additional safeguard, the duty to call the witness to the stand would not have sufficiently protected the accused against a concealment of evidence.

165. See *People v. Riley*, 191 Misc. 888, 83 N.Y.S.2d 281 (Kings County Ct. 1948). The fact that the witness was a handwriting expert would presumably put the defense on notice that he would be able to give expert testimony as to the authenticity of the signature, the main issue in the case. If the defendant's counsel were not given adequate time to determine the scope of the testimony that would be given by the witness and to determine the advisability of calling the witness to the stand, he might prudently elect not to do so, especially in light of the fact that the witness had been employed by the prosecutor. A full disclosure of the testimony the witness would give would allow the defense attorney to determine whether to call the witness or ask the court to call him.

166. Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 YALE L.J. 136 (1964); see Note, *The Duty of the Prosecutor to Disclose Exculpatory Evidence*, 60 COLUM. L. REV. 858 (1960); Note, *Discovery and Disclosure: Dual Aspects of the Prosecutor's Role in Criminal Procedure*, 34 GEO. WASH. L. REV. 92 (1965).

Even though the defendant knows of the existence of a witness and the evidence he can give, there may be situations where it would be fundamentally unfair to make him call the witness to the stand. The defendant may be reluctant to call the witness if he is hostile, biased, or disreputable, fearing either that the witness will lie or that his disreputable qualities will open the door to an attack by the prosecutor which will reflect on the defense's merit.<sup>167</sup> As one court observed, the most reputable persons are not usually found at the scene of a crime.<sup>168</sup> Moreover, in calling the witness, the accused faces several handicaps. He may be confronted by the common law prohibition against impeaching his own witness, though this problem has been modified somewhat by statutes and decisions.<sup>169</sup> While the trial judge has the discretion to allow leading questions, this may be conditioned on the ability of the defendant to show that the witness is hostile.<sup>170</sup>

On the other hand, the defendant gets the advantage of cross-examining any witness called by the prosecutor.<sup>171</sup> He is allowed to ask leading questions,<sup>172</sup> and to impeach the witness to show bias, self-interest, prior inconsistent statements, or bad character.<sup>173</sup> Moreover, the defendant not only avoids the procedural disabilities discussed above, but may in fact succeed in saddling the prosecutor with them.<sup>174</sup>

In at least one type of case, this shifting of the procedural handicaps from the defendant to the prosecutor seems fully justified. This is the case in which a paid informer or special employee of the government has played a material part in gathering evidence against the accused. A federal district court reversed a conviction where the government failed to call such a witness when the defense interposed was entrapment.<sup>175</sup> Chief Justice Warren

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167. See McCORMICK, EVIDENCE § 33 (1954).

168. *People v. Elco*, 131 Mich. 519, 526, 94 N.W. 1069, 1074 (1903).

169. McCORMICK, EVIDENCE § 38 (1954). For a full discussion of the issues involved here, see Note, 49 VA. L. REV. 996 (1963).

170. McCORMICK, EVIDENCE § 6 (1954).

171. *Id.* § 19.

172. *Id.* § 20.

173. *Id.* § 33.

174. See *State v. Guilfoyle*, 109 Conn. 124, 145 Atl. 761 (1929). Unless court decisions or statutes provide otherwise, the procedural incidents of calling a witness would presumably fall upon the prosecutor in calling the witness to the stand. Michigan has, by statute, removed any handicap the prosecutor would thus suffer. MICH. STAT. ANN. § 29.980(1) (1954).

175. *United States v. Ramsey*, 220 F. Supp. 86 (E.D. Tenn. 1963). The court pointed out that the failure to call the witness, coupled with the fact that he had been unavailable in previous trials of other persons, raised an inference that the testimony was being deliberately withheld. *Id.* at 89. In granting a new trial the court ordered the prosecutor either to offer the informer as a witness or to assign reasons why this could not be done. *Id.* at 90. The court relied heavily on Chief Justice Warren's concurring

has pointed out that an informer is able to work effectively because of his past criminal conduct and association with unsavory people.<sup>176</sup> These traits cause the accused and others to trust him, and these same characteristics make the prosecutor unwilling to call him as a witness. If the accused is forced to call the informer to get his testimony before the jury, or even if the informer is called as a witness by the court, the government gets a bonus. Not only has the prosecutor profited by the evidence the informer has gathered, the Chief Justice points out, but he is able to attack the accused's case by impeaching the informer's credibility for bad character if he gives any evidence helpful to the accused.<sup>177</sup> The unfairness of the situation seems too obvious to belabor. Since it is the government which has elected to use the informer, it is only fair that any onus resulting from doing so should fall on the prosecutor, not the accused.<sup>178</sup> Aside from this narrow

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opinion in *Lopez v. United States*, 373 U.S. 427, 441 (1963), which criticized *On Lee v. United States*, 343 U.S. 747 (1952).

Federal courts have generally not adopted the view of the *Ramsey* case, that the prosecutor should be compelled to call witnesses in this type of case to avoid unfairness to the accused. *E.g.*, *United States v. D'Angiolillo*, 340 F.2d 453 (2d Cir.), *cert. denied*, 380 U.S. 955 (1965); *United States v. Romano*, 278 F.2d 202 (2d Cir. 1960); see *United States v. White*, 344 F.2d 92 (4th Cir. 1965) (restricting *Ramsey* to entrapment cases). *But see* *United States ex rel. Drew v. Myers*, 327 F.2d 174 (3d Cir.), *cert. denied*, 379 U.S. 847 (1964); *United States v. Clarke*, 220 F. Supp. 905 (E.D. Pa. 1963). The narcotics convictions of two doctors were reversed in the *Clarke* case and the government was ordered to make reasonable efforts to *produce* (not call) the "special employee" at the new trial. Observing that only a token effort had been made by the prosecutor to produce the informer, the court said that, "candor compels us to note that Agent Cockerill [the narcotics agent] seems to have experienced little difficulty in locating Flores [the informer] when he needed his services as a 'special employee' a year earlier." *Id.* at 909. The defense in the case was entrapment.

176. *Lopez v. United States*, *supra* note 175, at 445.

177. *Ibid.* The Chief Justice points out that simply by refusing to call the informer, the prosecutor places the "onus of finding and calling a disreputable witness" on the accused and gains the ability to impeach the witness as a witness for the accused.

"The more disreputable the informer employed by the Government, the less likely the accused will be to establish any questionable law enforcement methods used to convict him." *Ibid.*

The Chief Justice contends that, practically speaking, this can bar the testimony of the witness from ever coming to light because a good defense attorney will not take the risk of calling him. This failure of the prosecutor to call the witness may in fact bar the accused from raising any constitutional issues as to methods used in gathering evidence against him. Presumably Chief Justice Warren bases this on his belief that a defense attorney will be unwilling to take the risks of calling such a witness in order to probe these areas.

178. In many of the cases considered the informer was a regular "employee" of the government. *E.g.*, *United States v. Clarke*, 220 F. Supp. 905 (E.D. Pa. 1963); *United States v. Ramsey*, 220 F. Supp. 86 (E.D. Tenn. 1963); *People v. Smith*, 174 Cal. App. 2d 129, 344 P.2d 435 (Dist. Ct. App. 1959). Presumably such a witness is either working for pay or for some favorable treatment. Considering his position, it is doubtful he will be helpful to the accused or antagonistic to his employer. The converse can be anticipated.

area,<sup>179</sup> any solution aimed at relieving the defendant of the handicaps implicit in calling a witness should avoid shifting them to the prosecutor.

If indeed the doctrines of disclosure and suppression are approaching the point at which the prosecutor will have an affirmative duty to disclose all exculpatory evidence to the accused, only the handicaps attendant to calling a particular witness remain as justifications for the prosecutor's duty to call witnesses to the stand. These handicaps can be grouped into two basic difficulties: the absence of the tools available to a cross-examiner, and what might be called the "guilt by association" possibilities inherent in calling disreputable or unsavory persons to support one's case.

One alternative to imposing a duty to call on the prosecutor that would bypass these stumbling blocks is to expand the use of court-called witnesses. In the relatively few jurisdictions which have considered this method,<sup>180</sup> it seems well settled that the calling of any witness is left entirely to the discretion of the trial judge.<sup>181</sup> If a witness is called by the court, both the prosecutor and the defendant may cross-examine and impeach him freely.<sup>182</sup> Since the accused did not have to call the witness himself, he cannot complain that he was forced into a guilt by association situation. The cases indicate that this device is presently used primarily by prosecutors who want the jury to hear a certain witness's testimony, but are unwilling to vouch for his reliability.<sup>183</sup> If trial judges are willing to accept the problems faced by

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Therefore, the tools of cross-examination should be in the hands of the accused and not the prosecutor.

179. There is little justification for placing the duty on the prosecutor to call an informer to the stand if he has done no more than supply information that leads to a search and seizure, or even an arrest. If the informer is not a close relative or personal friend of the accused, the issue of entrapment will not be involved. It is impossible to lay down a formula which will draw a hard and fast line between this situation and one such as was posed in *United States v. Clarke*, 220 F. Supp. 905 (E.D. Pa. 1963), or *United States v. Ramsey*, 220 F. Supp. 86 (E.D. Tenn. 1963). In deciding a particular case the court should consider the relationship between the informer and the accused and the degree of participation by the informer in gathering the evidence against the accused, including what role he has played in the commission of the crime for which the accused is on trial. The court should also consider the past use of the particular informer's services by the government, the extent to which he has been compensated for the work and the type of compensation, i.e., favorable treatment or money, and whether or not particular evidence is peculiarly within the knowledge of the informer. The absence or presence of any one of these factors should not be controlling in itself.

180. See generally Annot., 67 A.L.R.2d 538 (1959).

181. *E.g.*, *United States v. Lutwak*, 195 F.2d 748 (7th Cir. 1952), *aff'd*, 344 U.S. 604 (1953); *Anderson v. State*, 35 Ala. App. 111, 44 So. 2d 266 (1950); *State v. Axilrod*, 248 Minn. 204, 79 N.W.2d 677 (1956), *cert. denied*, 353 U.S. 938 (1957). *But see State v. Cain*, 20 W. Va. 679 (1882).

182. Annot., 67 A.L.R.2d 538, 551, 553 (1959).

183. *United States v. Lutwak*, 195 F.2d 748 (7th Cir. 1952), *aff'd*, 344 U.S. 604

defendants as sufficient reasons for calling some witnesses themselves, the availability of the court-called witness device to defendants obviates any need for imposing a duty to call on the prosecutor.

However, the decisions which have dealt with the above method, while admitting its propriety, have warned that it should be employed very sparingly.<sup>184</sup> This seems to be sound advice; the adversary nature of the trial is again being tampered with, and the problem of preventing the attachment of undue weight to a court-called witness's testimony is practically insurmountable. Besides, a defendant would be faced with the same familiar problems any time the judge denied his request to call a witness, and appellate reversals based on the failure of a trial judge to exercise his discretionary power to call a witness are nonexistent.<sup>185</sup>

A better way of eliminating the defendant's handicaps while avoiding the imposition of an affirmative duty to call on the prosecutor is at hand. The common law rule against impeaching one's own witness could be discarded, or at least the exceptions to it could be greatly liberalized.<sup>186</sup> This sensible suggestion, which is supported by both Dean Ladd<sup>187</sup> and Professor Morgan<sup>188</sup> and by some strongly worded federal court decisions,<sup>189</sup> has been embodied in the Uniform Rules of Evidence.<sup>190</sup> The objection to this alternative is that it leaves untouched the intangible guilt by association problem faced by an accused, who may well be forced to call disreputable witnesses to make out his defense. However, when any witness, disreputable or otherwise, gives testimony favorable to the defendant, it seems likely that the jury will look upon him as part of the defendant's case, whether he was actually called to the stand by the defendant, the prosecutor, or the court.

(1953); *Olive v. State*, 131 Fla. 548, 179 So. 811 (1938); *People v. Banks*, 7 Ill. 2d 119, 129 N.E.2d 759, *cert. denied*, 351 U.S. 915 (1955); *People v. Siciliano*, 4 Ill. 2d 581, 123 N.E.2d 725, *cert. denied*, 349 U.S. 931 (1955); *People v. Cardinelli*, 297 Ill. 116, 130 N.E. 355 (1921).

184. *Smith v. United States*, 331 F.2d 265 (8th Cir.), *cert. denied*, 379 U.S. 824 (1964); *United States v. Marzano*, 149 F.2d 923 (2d Cir. 1945); *City of Portales v. Bell*, 72 N.M. 80, 380 P.2d 826 (1963); *Hill v. Commonwealth*, 88 Va. 633, 14 S.E. 330 (1892); *State v. Loveless*, 142 W. Va. 809, 98 S.E.2d 773 (1957).

185. See, e.g., *United States v. Lester*, 248 F.2d 329 (2d Cir. 1957); *Buchanan v. State*, 95 Fla. 301, 116 So. 275 (1928).

186. For a full discussion of the history and scope of this rule see Note, 49 VA. L. REV. 996 (1963).

187. Ladd, *Impeachment of One's Own Witness—New Developments*, 4 U. CHI. L. REV. 69, 96 (1936).

188. 1 MORGAN, BASIC PROBLEMS OF EVIDENCE 64-65 (1954).

189. *United States v. Freeman*, 302 F.2d 347 (2d Cir. 1962); *London Guarantee & Acc. Co. v. Woelffe*, 83 F.2d 325 (8th Cir. 1936).

190. UNIFORM RULES OF EVIDENCE 20; see MODEL CODE OF EVIDENCE rule 106(1) (1942).

In summary, the utility of the duty to call witnesses is rapidly diminishing in the face of developments in other areas of the law of criminal procedure. Moreover, these related developments do not involve any fundamental changes in the adversary system which may be attendant to the imposition of a duty to call witnesses.