The General Practitioner

Newsletter of the State Bar of Michigan Solo and Small Firm Section

Volume 41, Number 4 July/August 2017

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EDITOR'S NOTES

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This newsletter will be published six (6) times per year by the Solo and Small Firm Section of the State Bar of Michigan to inform members of the Section activities and other matters of particular interest to general practitioners.

Now You Can Say

By Howard Yale Lederman

Now that summer has come, let's be a little less serious about the law. Let's look at a few cases featuring the extraordinary. Has anyone heard of a Michigan judge disobeying a court order? After reading this article, you can say, "I have."

We all know that contempt of court involves disobedience, evasion, or violation of court judgments or orders. Attorneys and parties aiming to disobey, evade, or violate court judgments or orders usually try to conceal their disobedience, evasion, or violation. At least, they try to make their disobedience, evasion, or violation subtle. But occasionally, they proclaim it with Admiral Farragut's damnation of the consequences.

During the Civil War, in August 1864, when about to enter Mobile Bay to capture the Confederate forts guarding Mobile, US Admiral Farragut encountered these formidable forts. They had many powerful guns. Additionally, two ironclad rams and numerous mines (then called torpedoes) blocked his way. Even approaching the forts was dangerous. His ship captains hesitated about going in. But they went in anyway.

Suddenly, the lead ship blew up. The Federal attack foundered in disorder. All remaining ships were under powerful Fort Morgan's guns to their right. A big minefield was on their left. Retreating was out of the question, because the fort's guns would destroy the ships, they would explode in the minefield, or they would crash into each other. So, Admiral Farragut ordered his remaining fleet keep going into the harbor under Fort Morgan's guns and the nearby mines and fight the Confederate forts and rams ahead with his immortal words: "Damn the torpedoes! Full speed ahead!"[1]

When facing possible contempt for disobeying a Michigan Supreme Court order, nobody expected a Michigan circuit judge to disobey it. But he did. He did not do so in our polarized judicial and political era. He did not do so over an ideological or moral issue. Rather, he did so over his all-too-human resentment over the Court's discovery of his inability to manage his docket.

In *In Re Huff*,[2] due to the 10th Circuit Court's "unsatisfactory condition of the dockets," at the Michigan Supreme Court chief justice's direction, on April 28, 1958, the court administrator transferred 10th Circuit Judge Eugene Snow Huff to the Third Circuit for one month from May 12, 1958 to June 12, 1958.[3] At the chief justice's direction, the court administrator also transferred 40th Circuit Judge Timothy C. Quinn to the 10th Circuit for the same one-month period. On May 8, 1958, Judge Huff refused the transfer in writing. On May 9, 1958, the Court ordered Judge Huff to transfer to the Third Circuit for the same one-month period and on the same date, notified him of the order.

On May 12, 1958, when the 10th Circuit Court opened, "Judge Quinn appeared in the courtroom…and declared that he was reporting for service and ready to assume the duties of presiding judge of the 10th Circuit for the month."[4] But Judge Huff appeared and announced that he would continue as the 10th Circuit's presiding judge and that through the assignment clerk, he would assign cases to Judge Quinn during the month. Then, the Michigan Supreme Court's agent served the Court's May 9, 1958 order on Judge Huff, Judge Quinn, and the assignment clerk. In response, Judge Huff declared that he would continue as the 10th Circuit's presiding judge, that he would not permit Judge Quinn to serve, and that he would not transfer to the Third Circuit.

On May 12, 1958, the Court, "on its own motion, entered a show cause order" against Judge Huff ordering him to appear before the Court on May 16, 1958, and show cause why the Court should not hold him in civil contempt.[5] On that date, the Court held the show cause hearing. When the Court offered Judge Huff "the opportunity to purge himself of contempt[,]" by "agreeing to obey" the Court's May 9, 1958 order, he refused "in open court… and stated that he was determined to persist in disobeying the May 9th [1958] order…."[6] After holding Judge Huff in civil contempt, the Court fined him and ordered him to transfer to the Third Circuit for one month beginning on May 19, 1958. The Court warned him that his continued defiance of the Court's orders would lead to undefined further enforcement action. But the Court did not threaten him with more serious sanctions, like imprisonment or removal from office. Would the Court have done so with the average person?

When Judge Huff challenged the contempt order on several grounds, including procedural due process, as expected, the Court brushed his challenges aside. As we all know, courts don't like attorneys and parties disobeying their orders. Such disobedience probably provoked just as

much stubbornness in the Court as he had shown.

When Judge Huff claimed a procedural due process violation based on the Court's refusal to adjourn the May 16, 1958 hearing to give him more time to prepare a defense, the Court found the four days reasonable. The Court noted that he had not specified any reason for needing more time. If he had done so, what would have been wrong with giving him a little more time?

The Court also determined that by appearing in court on the above hearing date, Judge Huff had waived all procedural irregularities. Looking at the Court's waiver conclusion through Judge Huff's eyes, what was he supposed to do? Indeed, Judge Huff's appearance had more support than the Court recognized. Waiver is "the intentional relinquishment or abandonment of a known right."[7] If Judge Huff had not appeared at the May 16, 1958 hearing, the Court could have rightly concluded that he had abandoned his right to a pre-contempt citation hearing and his right to a hearing on his procedural challenges. His conduct would have embodied the waiver definition. By appearing at the hearing, Judge Huff was not abandoning his rights but asserting them.

The Court reaffirmed the courts' "inherent power…to adjudge and punish for contempt[,]" civil and criminal.[8] Though Michigan courts' contempt powers have a statutory basis in then-effective CL 1948, Sec 605.1 et seq, the courts' inherent power is "independent of" their statutory power.[9]

So, for the first time in its history, the Court held a sitting trial court judge in contempt. He asked for it. When faced with possible contempt, he came out with all guns blazing: "Damn the torpedoes! Full speed ahead!" Unlike Admiral Farragut, he could not overcome the formidable guns, rams, and mines blocking his way. But you can say: "Yes, the Michigan Supreme Court has held a Michigan circuit judge in contempt!"

Articles III\Contempt Article 07 05 17 http://www.civilwar.org/learn/articles/damn-torpedoes.pdf.

Endnotes

1 Robert M. Browning, Jr., *Damn the Torpedoes,* 28 Naval History Magazine (August 2014), available at https://m.usni.org/magazines/navalhistory/2014-07/damn-torpedoes.pdf, Craig L. Symonds, *Damn the Torpedoes The Battle of Mobile Bay,* Civil War Trust, available at http://www.civilwar.org/learn/articles/damn-torpedoes.pdf.

2 *In Re Huff,* 352 Mich 402; 91 NW2d 613 (1958).

3 *Id* at 407.

4 *Id* at 408.

5 *Id* at 409.

6 *Id* at 412.

7 *Eg, Quality Products & Concepts Co v Nagel Precision Products, Inc,* 469 Mich 362, 379; 666 NW2d 251 (2003), *People v Carter,* 462 Mich 206, 214; 612 NW2d 144 (2000), *People v Carines,* 460 Mich 750, 762 FN7; 597 NW2d 130 (1999), *Maxey v Proctor,* 343 Mich 453, 45_; 72 NW2d 198 (1955), *Weller v Manufacturers Life Insurance Co,* 256 Mich 532, 536; 240 NW 34 (1932).

8 *Huff,* 352 Mich 402, 415.

9 *Id. Accord, In Re Contempt of Dougherty (Dougherty II),* 421 Mich 81, 91 FN14; 413 NW2d 392 (1985), *In Re Estate of Bradley,* 494 Mich 367, 379; 835 NW2d 545 (2013).

Top 6 Appellate Tips

By Kimberlee A. Hillock, Willingham & Coté, PC

1. **Attach the entire deposition transcript in summary disposition motions.** When an attorney is intimately familiar with a case, the attorney may think that only one or two pages from the transcript need to be attached to prove the point. However, for the reviewing judge or clerk, a single page or two may not give enough context as to the line of questioning. There are often additional statements supporting the attorney's position, which cannot be used on appeal unless they were attached at the trial court level. Also, when only one or two pages are attached, it looks like the attorney is hiding something. This is especially true when opposing counsel cites other portions of the same transcript supporting his or her position. It is better to attach the entire transcript, even the unfavorable parts (see tip 3 below).

2. **Proper citation to documents in summary disposition motions.** MCR 7.212(C)(6) requires that a statement of facts in an appellate brief contain "specific page references to the transcript, the pleadings, or other document or paper filed with the trial court." This is so that the reviewing appellate attorney at the court can find the document in the trial court record and verify that the issue is preserved and the document was before the trial court. When the document is properly cited in the summary disposition motion, it is easy to update this citation in the appellate brief. Also, I think it helps to cite to the trial court record in the same manner as the reviewing appellate attorney does in his or her prehearing reports/bench memos/commissioner reports (anything to make it easier for review is my motto). I have inherited appeals from other law firms with citations to the record that I cannot decipher and therefore have to create from scratch, which takes time; you don't want to do that to your reviewing attorney because the reviewing attorney may not take the time. So, for example, "**Deposition of John Smith, 12/1/16, pp 23, 27, attached as Exhibit A** to Joe Client's summary disposition motion, 12/15/16, attached hereto as Exhibit A." The bold portion would be the citation in the summary disposition motion, the rest of the citation would be added on appeal.

3. **Not ignoring the unfavorable facts but addressing them head on.** It is best to address unfavorable facts as early as possible on appeal. Ignoring the facts will only make it look like you are being less than candid with the court, and counsel will have a field day with this. Presenting unfavorable facts on appeal is mandatory. MCR 7.212(C)(6) requires the statement of facts to be "clear, concise, and chronological," and "All material facts, *both favorable and unfavorable*, must be fairly stated without argument or bias." It is *not* a good practice to ignore the unfavorable facts. The reviewing attorney goes through the entire record and will certainly uncover them. Opposing counsel will most certainly highlight them and accuse your client of lying to the court. The Court of Appeals and Supreme Court will not look favorably on an argument that ignores them. It is much better to be the one to present the unfavorable facts for three reasons: 1. makes you look more credible. 2. takes the wind out of opposing counsel's sails. and 3. allows you to present the unfavorable facts in as positive a light as possible.

4. **Reply briefs are for rebuttal argument only.** This is your chance to tell the court why the other side's argument/authority is incorrect or inapposite. In the 2013 Appellate Bench Bar Conference, the Michigan Supreme Court stated that reply briefs focusing on rebuttal were the most helpful. Filing a reply brief that merely reiterates your original position in the appellant brief is a waste of your time and your client's money, and it will merely irritate the reviewing attorneys and judges.

5. **E-file.** There are several advantages to this. 1. One doesn't need to produce multiple paper copies of the brief. 2. Easier to serve everyone. 3. Eliminates nth-hour mad dashes to the courthouse to hand file. 4. If done correctly with text recognition and bookmarking, the brief and exhibits are user-friendly. 5. More than half the Court of Appeals judges and Supreme Court justices prefer to review briefs on their electronic devices rather than paper copies, and I predict this number will become higher as judges retire and are replaced with the younger crowd. 6. Easier for the three-judge panel to circulate and read.

6. **Include ALL relevant exhibits.** There is only one "paper" copy of the record. If you want all judges to consider the relevant portions of the record, attach them to your briefs as exhibits.

About the Author

Kimberlee A. Hillock is a shareholder and a chairperson of Willingham & Coté, P.C.'s Appellate Practice Group. Before joining Willingham & Coté, Ms. Hillock worked as a research attorney and judicial clerk for the Honorable Donald S. Owens of the Michigan Court of Appeals, and as a judicial clerk for the Honorable Chief Justice Clifford W. Taylor of the Michigan Supreme Court. Since joining Willingham & Coté in 2009, Ms. Hillock has achieved favorable appellate results for clients more than 60 times in both the Michigan Court of Appeals and the Michigan Supreme Court in areas such as premises liability, negligence, insurance coverage, no-fault, tax, family law, child custody, and equine liability. She has more than 14 years' experience in appellate matters and is a member of the Michigan Supreme Court Historical Society Advocates Guild. She can be reached at khillock@willinghamcote.com, or 517-324-1080.

Announcements

Medical Marijuana Update

July 27, 2017 • 6:00 p.m.–8:00 p.m.

WMU Cooley Law School • 300 S Capitol Ave, Room 911 • Lansing • 48933

Michigan Voters approved the Medical Marihuana Act on November 4, 2008.
Do you know what is allowed? How has the Act been interpreted by the Courts?
Do not remain in the dark— Attend this seminar! Sign up today!

Our Speakers: Mary Chartier, Robert Hendricks, and Mike Nichols

Refreshments, delicious appetizers, soft drinks and water provided

Register online at http://e.michbar.org

NEXT CONFERENCE

SBM
State Bar of Michigan
ANNUAL MEETING

September 27–29, 2017

Cobo Center, Detroit

Solo & Small Firm Section Business Meeting & Program

10:30-11:00 a.m. Business Meeting
11:00 a.m.-Noon Program—Technology 101

Integrating technology into a solo or small firm law practice is almost mandatory for its success. Get the latest, the greatest, and the "must haves" in legal software, electronic staffing options, accounting, and protecting confidential information.

Moderator: Tanisha M. Davis, Law Offices of Tanisha M. Davis PLLC, Southfield

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Discovery: The Criminal Case

By Maury Klein

This article is intended to provide a template to make sure that if you have taken a criminal case, you have the means to obtain the evidence that will be arrayed against your client. First following is the demand for discovery which you should serve on the prosecutor at your first court appearance.

If you don't receive the materials (i.e. a date/commitment from the prosecutor/police department to provide same), you need to set a motion using the memo which follows second.

As always, this is meant to provide a basic overview, and the experience of the readership is welcomed. Feel free to use the listserv for this purpose.

STATE OF MICHIGAN

IN THE DISTRICT COURT FOR THE XXTH JUDICIAL DISTRICT

PEOPLE CASE NO. _____

-vs- Hon.

XXX XXXXXX

Defendant

_____/

DEMAND FOR DISCOVERY

NOW COMES Defendant XXX XXXXX by and through his attorney Maury Klein and demands of the prosecuting attorney by means of this document, all possible material or relevant evidence, not privileged, that the prosecuting attorney has presently acquired or subsequently collects

prior to trial or pre-trial scheduled in this cause.

It is understood that this request is continuing and the information sought is expected to be timely furnished in order to allow defense counsel to properly prepare for any scheduled court proceeding.

Defendant demands production of the following items from the prosecuting authorities, whether or

not the prosecution intends to introduce these items into evidence at trial.

1. Copies of the Complaint and Warrant.
2. Copies of any police incident reports, alcohol influence reports, accident and/or injury reports.
3. Copies of any statements, admissions or remarks allegedly made by the defendant.
4. Copies of any audio or video tapes taken of the defendant and/or complainant taken during the investigation and arrest.
5. Witness statements and the names and addresses of any witnesses who may have information regarding the guilt or innocence of the defendant arising out of the incident under which the defendant is charged.
6. A list of the evidence intended to be used against the defendant at trial that is not part of the written police report furnished to defense counsel.
7. Notice of all physical evidence that has been collected whether or not being sent to a lab for testing.
8. All lab tests and results.
9. Any exculpatory evidence or evidence mitigating the degree of the offense or reduce the punishment.

WHEREFORE, defendant prays this honorable court for an order requiring the prosecution to provide the information sought above and if the information is not supplied, defense counsel will file the appropriate motion(s) for dismissal and/or suppression.

Respectfully Submitted,

_____

MAURY KLEIN (P38062)
Attorney for Defendant
17000 W. Ten Mile Rd., #150
Southfield, MI 48075
(248) 423-9333

DATED:

MEMORANDUM IN SUPPORT OF
MOTION FOR PRE-EXAMINATION DISCOVERY
AND INSPECTION AND FOR TURN-OVER OF BRADY MATERIAL

GENERAL:

The Defendant, , brings this Motion for Pre-Examination Discovery and Inspection and for turn-over of *Brady* material pursuant to the inherent power of the Court to control the admission of evidence so as to promote the interests of justice and assure the fundamental fairness of the criminal justice system. *People v Johnson*, 356 Mich 619 (1958); *People v Aldridge*, 47 Mich App 639 (1973).

Defendant specifically incorporates the demand for discovery (Exhibit A) which was personally served upon prosecutor at pre-trial of the instant cause.

The fundamental principles of criminal law and the basis for discovery and inspection in the American legal system are derived from the Fifth and Sixth amendments of the United States Constitution. The first principle is stated in the Sixth Amendment:

> "In all criminal prosecutions, the accused shall...be informed of the nature and cause of the accusation..."

This constitutionality principle is deeply rooted in the history of criminal law, based upon the reasoning that in order for a person to be able to defend himself against any charge, he must first know the *nature* and *cause* of the accusation. The defendant seeks discovery and inspection of particular items in the attached motion in order to defend himself against these charges in a manner consistent with these constitutional guarantees as well as those provided for under Article I, §20 of the Michigan Constitution.

The prosecutor's policy of providing for no discovery nor providing for a copy of the police report and/or other relevant discovery concerning a defendant regardless of the status of the criminal prosecution has been held to be an inexcusable obstruction of justice for which dismissal of the charges is warranted. *In Re Bay Prosecutor*, 109 Mich App 476 (1981) and *People v Bellanca*, 386 Mich 708 (1972). The Michigan Supreme Court, commenting on effective counsel, stressed that defense counsel:

> "Must be properly prepared for cross-examination of the prosecution's witnesses and thus, he must have access to the testimony of such witnesses before a state grand jury touching on matters in issue at a preliminary examination". 386 Mich at 714.

In *People v Aldridge*, 47 Mich App 639 (1973), the Michigan Court of Appeals reiterated that the Prosecutor's Office, as the people's representative, is basically charged with seeking the ascertainment of truth. In *People v Wimberly*, 384 Mich 62 (1970), the Michigan Supreme Court held that prior to trial the trial judge possesses discretion in the interest of a fair trial to release any and all grand jury testimony relevant to guilt or innocence of the defendant and the crime charged. Thus, the Michigan Court of Appeals concluded with regard to discovery at the preliminary examination stage by holding as follows:

> "The prosecutor's policy of refusing to provide a copy of police reports to defendants, when examined in the light of *Aldridge* and *Johnson*, is an unexcusable obstruction of the pursuit of justice. Such blatant abuse of prosecutorial power cannot be condoned. Technical requirements that discovery necessarily is limited for the preliminary examination to permit the matter to proceed properly falls short of persuasion since the prosecutor's statements suggest that this policy applies, regardless of the stage of the proceedings.
>
> The problem cannot be cured by the fact that the prosecutor read the police report to defense counsel and was willing to let him see it in the courtroom. Having the report read to the attorney immediately arouses suspicion that the material is being edited or censored. Moreover, such brief exposure to the report, be it in the prosecutor's office of the courtroom, does not lend itself to the type of steady contemplation and analysis that the preparation of a criminal matter of this nature requires. Fundamental fairness requires disclosure, which can be accomplished only by providing copies of the police report." *In Re Bay Prosecutor*, 109 Mich App 476, 485-486 (1981).

People v Johnson, 356 Mich 619 (1959), stands for the proposition that fairness to the defendant, including an opportunity to prepare a defense, and preparation for cross-examination of witnesses, required that the defendant be given access to all relevant information.

The Michigan Rules of Discovery, effective January 1, 1995, indicates at MCR 6.201(b), that a defendant is entitled to, upon request, the following:

1. Any exculpatory information or evidence known to the prosecuting attorney;
2. Any police report concerning the case except so much of a report as concerns the continuing investigation;
3. Any written or recorded statements by a defendant, co-defendant or accomplice, even if that person is not a prospective witness at trial;
4. Any affidavit, warrant and return pertaining to a seizure or search in connection with this case; and
5. Any plea agreement, grant of immunity or other agreement for testimony in connection with the case.

SPECIFIC REQUESTS:

A and B

In requests designated "A" and "B," defendant respectfully requests copies of all original otes of the police officers. (The police reports prepared by the police with respect to this case.) It goes without saying that all of the investigation leading to the filing of the charges in this case was done by police officers, and further, that they took notes and made reports from which they will testify. Defendant's Fifth and Sixth amendment rights require that these notes and reports be produced, inspected and copies given to defendant.

In *People v Marra*, 27 Mich App 1 (1970), the Court upheld a defendant's right to the handwritten notes of a police officer stating:

> "however, there is no reason to refuse a defendant notes at trial if they are a substantial transcription of the complaining witness' own words or if the police officer has refreshed his recollection with the notes and based his testimony on them" Id. at 7.

C

Under this subsection, defendant requests discovery of any statements made by him to police officers during the investigation of this case.

Especially powerful considerations militate in favor of discovery of the defendant's own statements, since they may be the most damaging possible evidence against him or may give the defense lawyer important investigative leads to exculpatory evidence. In addition, the defendant cannot make an informed decision whether to testify on his own behalf without knowing the contents of any of these statements that are in the hands of the police and the prosecution. Thus, the defendant's own statements have been held to be discoverable. *People v Johnson*, *supra*; *People v Wimberly*, 384 Mich 62 (1970).

D

The defendant has requested discovery and inspection of any and all tangible items seized from him and/or pertaining to his case. Tangible objects in control of the prosecution that the prosecution claims belong to the defendant and connect him to the alleged offenses can be examined by him. *People v McCartney*, 60 Mich App 620 (1975). With particularity, defendant seeks a copy of the 911 call he made. The incident occurred July 21, 2005, and said record will be destroyed shortly. Furthermore, the courts have recognized that it is appropriate to grant a defendant discovery of all items which the prosecution proposed to offer into evidence at

trial. It may be impossible for the defense to prepare if they see the prosecution's evidence for the first time at trial. In *United States v Reed*, 43 FRD 520, 522 (ND Ill, 1967) the court addressed itself to a similar request for discovery and inspection:

> "We think the defendants should be afforded access to the documents, papers and tangible evidence which the government intends to introduce into evidence at trial. In an appropriate case, this procedure could be not only beneficial to the defendants, but also to the court by streamlining the litigation in producing timesaving stipulations of fact between the parties, and indeed perhaps making a trial unnecessary by pointing out to the defendant the enormity of the government's case against him." See also *United States v Tanner*, 279 F Supp 457, 468-470 (ND, Ill, 1967).

E and F

The defendant also seeks any statements of complainant. Clearly, such information is essential to the proper preparation of the defense in this case. Effective confrontations and cross-examination cannot be carried out unless such statement is made available in advance to the accused. It is even more important that counsel have access to any statements which might have been given by complainant prior to trial so that his function as defense counsel might properly be performed. *People v Walton*, 71 Mich App 478 (1976).

The defendant notes that at the very least, the prosecution is under an affirmative duty to disclose any items of evidence or information which may tend to exculpate him. In *Brady v Maryland*, 373 US 93 (1963), the United States Supreme Court acknowledged the prosecution's advantage in a search for evidence by reason of the special powers it possesses. For instance, it recognizes that there are many occasions when witnesses feel obliged to talk to law enforcement officials but will not talk to defense counsel. Furthermore, it recognizes that in certain instances where witnesses are not inclined to speak to either side, they can be forced by the prosecution to testify before a grand jury under the compulsion of a subpoena. These discovery devices, of course, are not available to the defense. Furthermore, the police and the prosecution have vast resources and manpower available to them while investigating and prosecuting alleged criminal offenses. The imbalance of these investigatory facilities inevitably works against the person accused of a criminal offense and can lead to an ill-prepared defense, and therefore, an unfair trial. It was a recognition of this obvious inequity that led to the decision in *Brady*. A failure to disclose such evidence or information would be a denial of the defendant's right to the due process of law under the Fifth Amendment to the United States Constitution. See also *Moore v Illinois*, 408 US 786 (1972); *People v Drake*, 64 Mich App 671 (1975).

The Defendant, in his Motion for Discovery and Inspection, has requested access to items which have been held to be discoverable. The Defendant believes that all the items requested to be produced for discovery and inspection are necessary for the proper defense against the charges brought herein; are consistent with the Constitutional guarantees of the United States and Michigan Constitutions and are not items in which, if disclosed, would hinder the prosecution in its proofs or prejudice the prosecution's case.

In conclusion, it is submitted that the law clearly provides for discovery at critical stages of the proceedings. The United States Supreme Court has held that a preliminary examination is a critical stage in criminal justice proceedings. *Coleman v Alabama*, 399 US 1 (1970). The Michigan Supreme Court reiterated this critical stage label in *People v Duncan*, 388 Mich 489 (1972). Your defendant therefore requests this honorable court to grant the relief sought in defendant's motion and order the appropriate discovery and furnish to defendant in sufficient time prior to trial (since the P.E. has passed) to insure defendant's rights and to compel the prosecution forthwith to provide a copy of the subject 911 tape.