Toward Effective Criminal Discovery: A Proposed Revision of Federal Rule 16

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TOWARD EFFECTIVE CRIMINAL DISCOVERY: A PROPOSED REVISION OF FEDERAL RULE 16

It is doubtless true that the theory of our adversary system is attractive in statement. It may be the best we can devise, but it seldom fits the facts in modern litigation. If it were to operate perfectly, both parties would have the same opportunities and capacities for investigation, including the resources to finance them, equal good or bad fortune with reference to availability of witnesses and preservation of evidence. . . . But there can be no question that the system ought to enable each litigant in advance to know the exact area of dispute and to have access to all available data. . . .

I. INTRODUCTION

The above words of Edmund Morgan urged the adoption of the proposed Federal Rules of Civil Procedure as a first step toward realistic civil litigation. Unfortunately, this piercing analysis of the adversary system, while heeded in the civil area, has been ignored by the administrators of criminal justice. This is not to say that strides have not been made toward more effective criminal discovery. The Federal Rules of Criminal Procedure have been amended to provide the defendant as well as the Government with a means for obtaining material evidence and New Jer-


Discovery and Inspection:

(a) Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, (2) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and (3) recorded testimony of the defendant before a grand jury.

(b) Other Books, Papers, Documents, Tangible Objects or Places. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivisions (a)(2), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. § 3500.

(c) Discovery by the Government. If the court grants relief sought by the defendant under subdivision (a)(2) or subdivision (b) of this rule, it may, upon motion of the government, condition its order by requiring that the defendant permit the government to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof,
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3, Vermont and California\(^3\) have led the states in developing a more meaningful system of pretrial criminal discovery. There is still, however, an apparent reluctance to afford the accused in a criminal trial a means of discovery equivalent to those means available to any other "litigant" in our adversary system; the stakes are different, but the principal is the

which the defendant intends to produce at the trial and which are within his possession, custody or control, upon a showing of materiality to the preparation of the government's case and that the request is reasonable. Except as to scientific or medical reports, this subdivision does not authorize the discovery in a form or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.

(d) Time, Place and Manner of Discovery and Inspection. An order of the court granting relief under this rule shall specify the time, place and manner of making the discovery and inspection permitted and may prescribe such terms and conditions as are just.

(e) Protective Orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by the government the court may permit the government to request, or make such as are in the form of a written statement to be inspected by the court in camera. If the court enters an order granting relief following a showing in camera, the entire text of the government's statements shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant.

(f) Time of Motions. A motion under this rule may be made only within 10 days after arraignment or at such a reasonable later time as the court may permit. The motions shall include all relief sought under this rule. A subsequent motion may be made only upon a showing of cause why such motion would be in the interest of justice.

(g) Continuing Duty to Disclose; Failure to Comply. If, subsequent to compliance with an order issued pursuant to this rule, and prior to or during trial, a party discovers additional material previously requested or ordered which is subject to discovery or inspection under the rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional materials. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances.


3. California's reform was accomplished primarily by appellate case law. See notes 162-73 and accompanying text infra. For a discussion and analysis of statutes and case law affecting criminal discovery in California, see Hill, Pretrial Discovery of Prosecution Witnesses in State Courts, in CRIMINAL DEFENSE TECHNIQUES § 11.03[3] (R. Cipes ed. 1969); Traynor, Ground Lost and Found in Criminal Discovery, 39 N.Y.U.L. REV. 228, 243-50 (1964). But see Murphy, Criminal Discovery: What Progress Since U.S. v. Aaron Burr?, 2 CRIM. L. BULL. 3 (Vol. 2, No. 5, 1966), for an analysis which indicates California's approach may not be as progressive as it might be.

New Jersey enacted a criminal practice rule in 1967 in order to improve its criminal procedure rules. N.J.R. 3:11-1, 3:13-3. See notes 175-81 and accompanying text infra. See also Hill, supra at § 11.03[4].

Vermont has one of the country's most progressive criminal deposition statutes. 5 VT. STAT. ANN. tit. 13, § 6721 (Supp. 1969). See notes 182-88 and accompanying text infra.

For an excellent overview of the tactics employed in criminal discovery, see AMSTERDAM, SEAL & MILES, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES §§ 265-76 (1967) ; Hill, supra; Rezneck, Pretrial Discovery in the Federal Courts, in CRIMINAL DEFENSE TECHNIQUES (R. Cipes ed. 1969).
same: in order for the adversary system to function properly, evidence must be accessible in advance so that the parties can prepare accordingly to meet their opponent's case.4

It is posited that our present criminal discovery provisions are inadequate and must be reformed to afford the criminal defendant liberal discovery opportunity in order to ensure a fair and just disposition of the case. The purpose of this Comment is fourfold: (1) to briefly discuss the evolution of pretrial criminal discovery, and the traditional arguments for and against liberalization; (2) to examine certain categories of evidence which a criminal defendant would want to discover and the provisions that the present system affords for discovery of this evidence; (3) to analyze recent proposals made to modernize criminal discovery; and (4) to propose further legislation geared to removing any remaining vestiges of the "sporting contest"5 from criminal litigation.

II. THE PRESENT STATE OF CRIMINAL DISCOVERY

There are two separate problems which must be examined if discovery reform is to be achieved — the type of evidence6 which is or should be discoverable and the procedural limitations on the discovery of such evidence.

A. Types of Evidence

1. WHAT IS DISCOVERABLE

Federal Criminal Procedure Rule 16 is the principal discovery device in the federal courts. The new Rule 16, which became effective in July, 1966, reflects a trend toward liberalizing criminal discovery.7 Under Rule

4. See Traynor, supra note 3, at 228.
6. "Evidence" is used throughout this Comment in its broadest sense and not restricted to items admissible at trial.
7. Prior to enactment of the new Rule 16 in 1966, the district judge, upon demand by the defendant, was authorized to permit inspection of "books, papers, documents, or tangible objects obtained from or belonging to the defendant or obtained from others by seizure or process." The rule further required that items be properly designated, material to the defendant's preparation for trial and the request be reasonable. Under the old Rule, the names and addresses of witnesses were usually not discoverable. See, e.g., United States v. Haug, 21 F.R.D. 22 (E.D. Ohio 1957). For a discussion of the operation of old Rule 16 and cases under it, see Discovery in Federal Criminal Cases, 33 F.R.D. 47, 106-07 (1963). Moreover, the defendant's own statements, vital evidence both to the defendant and the prosecutor in that they are admissible at trial to the extent that they contain admissions, were held to be undiscoverable under the old Rule 16. See Discovery in Federal Criminal Cases, 33 F.R.D. 47, 107 (1963).

The denial of discovery of these items was based, apparently, on the theory that Rule 16 only operated when the defendant had a property interest in his own statement. See, e.g., United States v. Murray, 297 F.2d 812, 820 (2d Cir. 1962), cert. denied, 369 U.S. 828 (1962). Although the Rule on its face afforded wide discretion to the trial judge in granting discovery of diverse types of evidence, it was generally strictly construed. See Traynor, supra note 3, at 229. It would seem, therefore, to be ineffective as a discovery device for the defendant.

Following the 1966 changes in the federal rules, some states re-evaluated their policies on criminal discovery. The commission revising New York's criminal
16(a) the accused is given access to (1) his own written or recorded statements or confessions in the possession of the government, (2) results of scientific reports and (3) the defendant's own recorded testimony before the grand jury. With respect to these categories of evidence, no burden is placed on the accused to designate items with particularity, to show their materiality to his case, or the reasonableness of his request. Although courts generally grant defendant's discovery requests, it is still very much within the trial court's discretion.

Rule 16(b) permits discovery of other "books, papers, documents, tangible objects . . . or portions thereof" which the Government has in its possession. Two burdens are placed on the defendant which he must meet before the court will grant his motion for discovery under 16(b): (1) the information or item must be material to the preparation of his defense and (2) his request must be reasonable. There is no language in subsection (b) that would require the standard of materiality to be any more stringent than that applied to the civil rules of discovery under Rule 26(b). Under the civil rules, items must be "relevant to the subject matter" but they need not be admissible in evidence if the defendant can show that the items he seeks to discover may lead to the discovery of admissible evidence. While the "materiality" requirement may be applied very liberally permitting broad discovery, it may also be applied stringently, placing a heavy burden on the defendant. There is no provision in Rule 16 for interrogatories to the Government or depositions by defense counsel for discovery purposes, and the Rule as applied could make the laying of a foundation to support a Rule 16(b) discovery motion impossible. As to tangible objects, it could be extremely difficult to demonstrate the materiality of an item which has never been seen by the defense or which the defense has no knowledge of its existence. "Reasonableness" is also left undefined by the Rule, and therefore remains a vague standard. However, it would seem that any request for an item which is material to the defendant's case will be deemed reasonable by the court.


For brief sketches of current state law of discovery, see Hill, supra note 3, at § 11.01[5]; Louisell, supra note 1, at 938-45; Moore, Criminal Discovery, 19 HAST. L.J. 865, 867-69 (1968).


8. See Rezneck, supra note 2, at 1277. Fed. R. CRIM. P. 16(b), retains these requirements as to items discoverable under the Rule.

9. However, the argument has been made that the rule grants a presumptive right of discovery to the defendant in light of the requirement in Fed. R. CRIM. P. 16(e) (protective orders), that discovery be refused if the prosecution shows a potential for abuse. See Moore, supra note 7, at 871.

10. See Rezneck, supra note 2, at 1279. See also Developments in the Law — Discovery, 74 HARV. L. REV. 940, 1007-08 (1961).

11. See Rezneck, supra note 2, at 1279.

12. Id.
Subsection (b) of Rule 16 specifically exempts from discovery two categories of evidence: (1) "reports, memoranda, or other internal documents made by government agents in connection with the investigation or prosecution of the case," and (2) "statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the Government except as provided in 18 U.S.C. § 3500." The former is a "work product" exemption; the latter, in effect, makes the Jencks Act the sole implement for discovery of witness' statements. It should be noted that the Rule 16 "work product" exemption is absolute while its counterpart in the civil rules can be circumvented; a showing of good cause may overcome the civil privilege for certain "work product" documents which would be completely exempted under the criminal rule.

Two important categories of evidence appear to be discoverable under subsection (b): (1) statements of co-defendants and (2) criminal records of government witnesses. Logically, subsection (b) should be read to cover items not otherwise covered by subsection (a) and not protected from discovery by specific exemption; therefore, it would seem discovery of these two items is apparently authorized by Rule 16(b).

At least one commentator believes that Rule 16(b) can be read to authorize pretrial discovery of statements of witnesses the Government does not intend to call at trial. The incorporation of the Jencks Act into subsection (b) could be interpreted that it shall serve as the sole method for discovery of witness' statements. The exemption in subsection (b), however, is limited to "government witnesses or prospective government witnesses," thereby leaving open the question of whether or not the statements of witnesses the Government does not intend to call should be discoverable. Such statements are never obtainable under the Jencks Act and if Rule 16(b) is read to exclude them from discovery, the defendant could be denied extremely important information.

Certainly subsection (b) should not be read to exclude evidence which could be constitutionally compelled as a matter of due process under

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent or the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.
15. See note 195 and accompanying text infra.
16. See note 208 infra. One commentator has suggested that Fed. R. Crim. P. 17.1, which provides for a pretrial conference, might lead to discovery of Jencks Act statements in the interest of a fair trial and if justice demanded. See Rezneck, supra note 2, at 1282.
17. See Rezneck, supra note 2, at 1281 & n.16.
18. Id. at 1284-87. Regarding co-defendant's statements and the constitutionality of their use against defendant, see Bruton v. United States, 391 U.S. 123 (1968).
19. Id. at 1284.
20. Id. at 1286.
Brady v. Maryland.22 The requirement in Brady that the Government make available material favorable to the defense greatly expands the evidence discoverable by the defense.23 The Supreme Court, while never clearly defining the type of evidence which must be disclosed, indicated that disclosure of information in the possession of the Government which is “favorable” to the defendant is compelled by the due process clause of the Constitution.24 The Court was not concerned with the motives of the prosecutor but rather focused on “fairness” to the defendant — who, in most instances, is at a great disadvantage in terms of investigatory capability. However, if “favorable” evidence is interpreted as encompassing only exculpatory evidence,25 then the defendant will lose discovery of evidence tending to prove his guilt but helpful in preparation of his case.26 It is also difficult to determine whether a particular piece of evidence is exculpatory in many instances and unless revealed to defense counsel it is impossible for him to show whether the evidence is exculpatory.27 If the primary concern of the Court was “fairness” to the defendant, then the proper standard should be whether the information in any way aids the defendant in preparation of his case. While the decision leaves many difficult questions unanswered,28 it does serve to some extent as a valuable supplement to Rule 16.

2. What Should Be Discoverable

Although there are many items of evidence which should be discoverable, an examination of the major areas — witness lists and statements; grand jury minutes and untranscribed testimony; and electronic surveillance, informants and illegal police activity29 — will serve as an illustration of the obstacles to effective discovery and trial preparation.

23. Id. Petitioner, convicted of first degree murder, asked for leniency based on a confession made by his co-defendant admitting the actual killing. The state had possession of all of the co-defendant’s statements, and when asked by defense counsel to hand over the statements it complied, excepting the crucial statement. The Supreme Court affirmed the Maryland court of appeal’s decision to grant a new trial on the issue of sentencing.
24. The Court stated that:
[i]The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.
Id. at 87. See Reznick, supra note 3, at §§10.05[11]–10.05[3]; Comment, The Prosecutor’s Constitutional Duty to Reveal Evidence to the Defendant, 74 Yale L.J. 136 (1964).
25. The Court in Pyle v. Kansas, 317 U.S. 213, 214, 216 (1942), remanded stating that “. . . the evidence there presented is inconsistent with the evidence presented . . . , and clearly exonerates petitioner” (emphasis added). The Court characterized the exonerating evidence as “favorable.” At least one court talks in terms of “material” evidence. United States ex rel. Thompson v. Dye, 123 F. Supp. 759, 762 (W.D. Pa. 1954). The language and rationale of the courts have been vague but relief has been granted only when the suppressed evidence was in some way exculpatory. See Comment, supra note 24, at 147 and n.50.
27. See Comment, supra note 24, at 147.
28. Id. at 149–50.
29. A more complete list would include such items as co-defendant’s statements,

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a. Witness Lists and Statements

Witness lists and statements, probably the most valuable evidence to defense counsel, are not readily available to him as a result of the incorporation of the Jencks Act into Rule 16(b). Several states have provisions for discovery of this material. However, there are several procedural obstacles to witness discovery in the jurisdictions which do permit it, e.g. the trial judge's discretionary power, which militates against the effectiveness of the disclosure.

One recent commentator suggests two factors which require that discovery of the names of witnesses be left to the discretion of the trial judge: (1) the danger of witness tampering and (2) the possibility of hampering the prosecution of large criminal organizations as a result of premature disclosure of informers. Substantially the same arguments are made for a similar stance on the statements of witnesses. It is further argued that the need for discovery is reduced because defense counsel could interview or take depositions of witnesses. This argument is not viable because in the interview situation the prosecutor may advise his

see ABA Standards, supra note 7, at § 2.1(a) (ii); Reznek, supra note 3, at §§ 10.02[5][c]; and prior criminal records of witnesses, see ABA Standards, supra note 7, at § 2.1(a) (vi); Reznek, supra note 3, at § 10.02(5)(d).

For similar treatment of categories of evidence, see ABA Standards, supra note 7, at 56-77; Moore, supra note 7, at 882-88; Developments in the Law, supra note 10, at 1043-61.

30. See note 7 supra for examples of state statutes. See also State v. Mahoney, 122 Vt. 456, 461, 176 A.2d 747, 750 (1961).

31. Most state courts permit inspection by defense counsel of witness' statements only for the purpose of preparing for cross-examination and impeachment rather than for the purpose of general pretrial preparation of an affirmative defense. The general rule is that such statements are made available to the defense only after the witness has testified on direct examination at the trial. In the more liberal jurisdictions, two basic requirements must be met: (1) the requested statement must be relevant and (2) the statement must be neither confidential nor otherwise privileged. Somewhat more conservative jurisdictions, on the other hand, usually permit such inspection only after defendant shows: (1) in what way, specifically, the statement will aid the defendant in cross-examination of that witness or (2) that an inconsistency exists between the witness' statement and the witness' testimony at trial.

Regardless of the jurisdiction in which the defendant comes to trial, in order that he discover witness' statements he must lay a proper foundation for inspection. At the very least he may be asked to show the statement's relevancy to his defense, and he may even be asked to show specifically in what manner the statement will impeach the witness or be otherwise useful in cross-examination. It appears necessary that the defendant have the statement before him in order to adequately hurdle the preliminary obstacles to discovery. Even if he manages to lay a proper foundation, the granting of the motion is "within the trial court's discretion." See Annot., 7 A.L.R.3d 181-217 (1966).

32. Moore, supra note 7, at 887.


34. See p. 696 infra.

35. But see McCray v. Illinois, 386 U.S. 300 (1967), in which the Court held that there is no constitutional duty to reveal the identity of an informer when the issue is the validity of the arrest without a warrant. For California's approach, see Hill, supra note 3, § 11.02[2][B].

36. See p. 686 infra.

37. See notes 30 and 182 infra.
witnesses not to discuss the case with any other persons,\textsuperscript{38} and because Rule 15,\textsuperscript{39} which provides for depositions, is so limited in its application that it is of little aid to the defendant as a discovery device.

The American Bar Association Advisory Committee, in an excellent comprehensive study of pretrial discovery standards,\textsuperscript{40} urged a different approach to the problem of witness lists and statements. The committee proposal directs the prosecutor to disclose to the defense counsel "the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, together with their relevant written or recorded statements. . . ."\textsuperscript{41} The committee argues that discovery of names and statements facilitates plea discussions and "goes to the heart of the general proposition that defense counsel must be permitted to prepare adequately to cross-examine the witnesses against the accused and otherwise test their credibility as well as to produce other evidence relevant to the facts in issue."\textsuperscript{42} The committee is persuaded by four basic principals — the fundamental concept of fairness requires early disclosure, prior disclosures alleviate delays at trial, early disclosure is necessary for adequate preparation and for minimizing surprise, and protective orders are available if a denial of discovery is required.\textsuperscript{43}

\textit{b. Grand Jury Minutes and Untranscribed Testimony}

The present rule limits discovery to defendant's statements before the grand jury.\textsuperscript{44} The grand jury hearing can be a very valuable tool of the prosecution\textsuperscript{45} because neither the defendant nor his counsel are permitted to be present at the hearing and the prosecutor has free rein to develop testimony of any witness he chooses to call. The testimony, therefore, tends to be one-sided and underdeveloped from a defense standpoint because defense counsel has not had the opportunity to cross-examine the witnesses called before the grand jury by the prosecutor. This shortcoming aside, the transcript would provide the defendant with statements of certain key witnesses and greatly aid him in explaining specific incriminating evidence and in refuting any perjured government testimony.\textsuperscript{46} However, the grand jury proceedings have traditionally been

\begin{itemize}
  \item \textsuperscript{38} In some jurisdictions it is possible to get an order to enjoin the prosecution from interfering with defense counsel's right to seek witness interviews. \textit{See} Lewis \textit{v.} Lebanon County, \textit{\textit{et al.}} \textit{v.}, \textit{\textit{et al.}} A.2d \textit{\textit{et al.}} (1969); People \textit{v.} Cooper, 53 Cal. 2d 755, 770-71, 349 P.2d 964, 973-74, 3 Cal. Rptr. 148, 157-58 (1960); Traynor, \textit{supra} note 3, at 244-45.
  \item \textsuperscript{39} \textit{Fed. R. Crim. P.} 15, permits the taking of depositions where the witness will be otherwise unavailable for trial. Its purpose is the preservation of testimony, rather than for the general purpose of discovery. For similar state rule, \textit{see} Mo. \textit{R. Crim. P.} 727.
  \item \textsuperscript{40} ABA \textit{Standards}, note 7 \textit{supra}.
  \item \textsuperscript{41} \textit{Id.} at \$ 2.1(a) (i).
  \item \textsuperscript{42} \textit{Id.} at 56.
  \item \textsuperscript{43} \textit{Id.} at 57-58.
  \item \textsuperscript{44} \textit{Fed. R. Crim. P.} 16(a), states in pertinent part that, "the court may order the attorney for the government to permit the defendant to inspect . . . (3) recorded testimony of the defendant before a grand jury."
  \item \textsuperscript{45} \textit{See}, \textit{e.g.}, \textit{Developments in the Law, \textit{supra}} note 10, at 1056-57.
  \item \textsuperscript{46} \textit{Id.} at 1057.
\end{itemize}
shrouded in secrecy.47 Here again the American Bar Association Advisory Committee takes a substantially liberal view in advocating discovery of grand jury testimony of the accused and "relevant testimony of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial."48 The committee cites Dennis v. United States,49 where the Court relaxed the standard for defense showing a "particularized need" and recognized that disclosure is in the best interest of proper administration of criminal justice,50 as indicative of a liberalizing trend in the courts. In a more recent decision51 a court also held that a defendant need not show a "particularized need" for the trial judge to allow disclosure under Rule 16.52

c. Electronic Surveillance, Informants, And Illegal Police Activity

Suppression of illegally seized evidence under the exclusionary rule53 at the pretrial stage is an important aspect of effective criminal defense. While the Court in Alderman v. United States54 required disclosure to the defense of records of illegal electronic eavesdropping, there was no indication as to when disclosure was to take place. The importance of early disclosure of illegal eavesdropping is apparent if the defense attorney is to put forth an effective argument for suppression.55 Disposition of this collateral issue, possibly at a pretrial hearing, could avoid delay at trial and circumvent any prejudice that might result from a jury being aware of defense counsel's efforts to "keep evidence from them."

Knowledge of the existence of informants is equally important to the defendant56 and poses problems of policy similar to those presented by discovery of illegal electronic surveillance. Early disclosure can hinder the prosecution of other crimes or otherwise compromise the Government concerning matters of organized crime or national security. These difficult policy considerations prompted the Advisory Committee to require the prosecutor initially to disclose only the possibility of an issue of illegal informants or electronic surveillance existing in the particular case.57

47. Id. at 1056. For criticism of grand jury secrecy, see Calkins, Grand Jury Secrecy, 63 Mich. L. Rev. 455 (1965); Seltzer, Pre-Trial Discovery of Grand Jury Testimony in Criminal Cases, 66 Dick. L. Rev. 379 (1962); Sherry, Grand Jury Minutes: The Unreasonable Rule of Secrecy, 48 Va. L. Rev. 668 (1962).
48. ABA Standards, supra note 7, at § 2.1(a) (iii).
49. 384 U.S. 853, 872 (1966). Fed. R. Crim. P. 6(e), authorizes disclosure of grand jury minutes "preliminarily to or in connection with a judicial proceeding." Usually a "particularized need" must be shown before disclosure of the minutes to defendant. See Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959).
50. Id. at 870.
52. ABA Standards, supra note 7, at 64.
56. See note 35 supra.
57. ABA Standards, supra note 7, at § 2.1(b) (i) and (iii), and commentary at 71-72. One alternative provided the government to protect informants is to move the court for permission to perpetuate a witness' testimony for use at trial if he is not available at the time of trial. This alternative
B. Procedural Deficiency of Rule 16

1. Discretion

The greatest source of confusion and ineffectiveness in criminal discovery from a defense standpoint is the trial court's application of its discretion in granting discovery. With no real guidelines for defining the boundaries of its discretion, the court will often base its decision on a variety of factors, some of which will be considered below. A few of these factors deserve weight, others do not. The real question, at this stage, is whether the trial court's discretion has any place in the initial determination of all requests for discovery or whether it should be called into play only as a protective measure after the prosecution has clearly demonstrated that the order must be denied to prevent abuse by defendant.

Rule 16(a) reads: "[u]pon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant" statements made by the defendant and results of scientific tests. Rule 16(b) contains the same language in regard to other items of evidence. Consequently, it is apparent that whether a defendant discovers certain evidence depends on the particular court's interpretation of its discretionary power. This interpretation can range from a presumption in favor of discovery to one that disfavors discovery.

should minimize the use of improper methods intended to force the witness to change his testimony or not show up at trial. See COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE 37, 53 (1970) [hereinafter cited as JUDICIAL CONFERENCE].

58. See Moore, supra note 7, at 868; United States v. Kamiński, 275 F. Supp. 365 (S.D.N.Y. 1967) (court denied discovery to defendant because he did not demonstrate that his request for discovery was warranted); United States v. Diliberto, 264 F. Supp. 181 (S.D.N.Y. 1967) (court held that actual need must exist before discovery would be granted); United States v. Louis Carreau, Inc., 42 F.R.D. 408 (S.D.N.Y. 1967) (court held that absent a showing of good cause the Government could not be required to make pretrial disclosure of defendant's prior statements).

Most states make witness discovery and other criminal discovery dependent on the discretion of the trial court. Alaska, Arizona, Colorado, Idaho, and Kentucky adopted discovery rules nearly identical with the old Rule 16. It is possible for the court in these jurisdictions to be within the bounds of its discretion while denying defendant access to confessions, scientific reports and tests, and statements of prosecution witnesses. See Hill, supra note 3, at § 11.01[5] & n.52; Annot., supra, note 31, at 208-11.

However, Florida, Illinois, Michigan, New Jersey, and Tennessee provide rules making mandatory pretrial disclosure to an accused of his confession or statements. Fla. R. Crim. P. 1.220; Ill. Rev. Stat. ch. 38, § 114-10; Mich. Gen. Ct. R. 785; N.J.R. § 3:13-3(2); Tenn. Code Ann. § 40-1708. Florida and New Jersey extend this mandatory class to include scientific or medical reports and recorded testimony by defendant before the grand jury. Fla. R. Crim. P. 1.220(a) (2), (3); N.J.R. § 3:13-3(a) (iii), (iv); Hill, supra note 3, at § 11.01(5), at 11-16.

59. See Moore, supra note 7, at 868.

60. This approach is most nearly approximated by California. Compare People v. Estrada, 54 Cal. 2d 713, 355 P.2d 641, 7 Cal. Rptr. 897 (1960); Cash v. Superior Court, 53 Cal. 2d 72, 346 P.2d 407 (1959); Funk v. Superior Court, 52 Cal. 2d 423, 340 P.2d 593 (1959), with People v. Lopez, 60 Cal. 2d 223, 384 P.2d 16, 32 Cal. Rptr. 424 (1963).

61. See Hill, supra note 3, at § 11.01(5), at 11-16.
While framing discovery in broad terms as a matter of right could foster abuse, framing it in terms of discretion can rob any discovery rule of real effectiveness.62

Two variables — the type of evidence and its usefulness to the defendant — have led one commentator to suggest that defendants be given the right to discover certain specified evidence, while other items should be left to the court’s discretion.63 To give this approach any force, discretion should be interpreted to mean that the defendant has a presumptive right to discover certain evidence, and that refusal to allow discovery should be based on a “reasonable likelihood of abuse of the privilege by defendant or his counsel.”64 However, this suggestion still leaves the defendant at the mercy of the court’s discretion — a subjective standard, easily abused.

Looked at realistically, instead of as a neat legal concept, ‘discretion of the trial judge’ in the area of criminal discovery appears more clearly for what it often is: an escape hatch from the rigors of formulating a reasonable rule for a complex situation. Actually, discretion of the trial judge has been pretty much the rule in criminal discovery for many years with the result that in most jurisdictions there has been no such discovery.65

This is not to say that protective measures are not necessary and both Rule 16 and the Advisory Committee’s proposals provide for protective orders.66 The committee’s approach, however, allows for more effective discovery. Its proposals mandate discovery of certain evidence; it is with regard to mandated matter that the committee envisions the use of the protective order.67 Rule 16, in contrast, contains “discretionary language”68 within the sections which authorize disclosure of a particular item in addition to Rule 16(e) which authorizes the protective order. The effect is that under Rule 16 the court’s discretion is automatically invoked when the accused moves for disclosure, while under the committee’s proposals it does not come into play until the prosecution has actually shown circumstances for denial of the discovery motion.

2. Relevancy and Materiality

A “relevancy” limitation found in Rule 16(a) and in the Advisory Committee’s proposed standards creates another area of difficulty. The

62. See Moore, supra note 7, at 881.
63. Id. at 881-82.
64. New Jersey and California have apparently implemented this interpretation of discretion. See Report of N.J. Supreme Court’s Special Committee on Discovery in Criminal Cases, 90 N.J.L.J. INDEX 209 (1967). For development of California appellate case law, see Murphy, supra note 3.
66. Fed. R. Crim. P. 16(e) ; ABA, STANDARDS, supra note 7, at § 4.4.
67. ABA STANDARDS, supra note 7, at 101.
68. The language in Fed. R. Crim. P. 16(a) (b) is “... the court may order.”
purpose of this limitation, as stated by the committee, is to prevent harass-
ment of one party by another or interference with government investi-
gation in unrelated cases.69 Most reasonable men would agree that the
defense counsel is the most qualified person to decide what is relevant to
his client's defense.70 Under our present system of criminal discovery,
however, the prosecutor in deciding what prior statements should be
offered to the defendant,71 and the trial court in deciding whether to allow
the prosecution to exclude part of a statement from discovery, are called
upon to make the "relevance" determination for the defense counsel.72
The committee, aware of the possibility of abuse, implores prosecutors
and trial courts not to be "stingy" in their interpretation of "relevance."73
The success of the committee's proposed rules depends on a liberal inter-
pretation;74 and the plea to prosecutors and judges to so interpret the term
isolates the problem, but does not solve it. A "stingy" interpretation can
still be well within the proposed standard and limitation of effective dis-
covery is the end result. It is this opportunity for emasculation which
must be eliminated from criminal pretrial discovery procedure.

3. The "At Trial" Standard

The Advisory Committee in its proposed standards requires the prose-
cutor to disclose only items, names, and statements which he intends for
use at trial. The committee recognizes several problems in the application
of this criterion of the "expected production at trial" as a requirement
for pretrial disclosure.75 The many variables that affect the prosecution
of a criminal case will severely limit the prosecutor's ability to accurately
predict what evidence he will produce at trial.76 The resultant delay in
the flow of information to the defendant deprives him of necessary evi-
dence and sufficient time for effective utilization when he finally does
receive it.77 This criterion is a severe impediment when the prosecutor
is deluged with a large volume of routine cases and will not, as a prac-
tical matter, begin serious preparation until shortly before trial.78 But

69. ABA Standards, supra note 7, at 54.
70. See Jencks v. United States, 353 U.S. 657 (1957); ABA Standards, supra
note 7, at 55.
71. See ABA Standards, supra note 7, at 55.
72. Id.
73. Id.
74. The Advisory Committee in commenting on the proposed amendments to the
civil rules' requirement of relevance stated:
[s]ince decisions as to relevance to the subject matter of the action are made for
discovery purposes well in advance of trial, a flexible treatment of relevance is
required and the making of discovery, whether voluntary or under court order,
is not a concession or determination of relevance for purposes of trial.
75. See ABA Standards, supra note 7, at 55.
76. Id.
77. It is possible for this delay to last until the trial itself. Id. at 55.
78. Id. at 56.
the committee argues that pretrial disclosure based on this "at trial" standard will increase the predictability of the trial,\textsuperscript{79} and impliedly, facilitate its disposition. In addition, the committee submits that the "at trial" criterion achieves one of the primary goals of pretrial discovery — to inform the defendant of the evidence he will be confronted with at the trial so that he can effectively dispute its validity.\textsuperscript{80} The committee has urged a sound policy, but it falls short of adequately meeting the defendant’s discovery needs. Beyond merely refuting evidence against him the defendant would do well to prepare a positive defense. To adequately do so he must have access to all available evidence regardless of its use at the trial itself. What the prosecutor cannot use, possibly the defendant can. This information might seem insignificant to the prosecutor and be lost in his files leaving the defendant without a crucial lead or necessary link in preparing his case.\textsuperscript{81}

III. THE CASE FOR AND AGAINST LIBERAL DISCOVERY

The lament of the prosecutor was perhaps most typically expressed by Judge Learned Hand:

Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully . . . Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream.\textsuperscript{82}

Traditionally there are several arguments which are raised by prosecutor’s\textsuperscript{88} as justification for limiting pretrial discovery by the accused: (1) full knowledge of the facts will afford the defendant the opportunity to

\textsuperscript{79} Id. at 55.
\textsuperscript{80} Id. at 56.
\textsuperscript{81} It is, perhaps, significant to note that no "at trial" limitation exists in civil discovery. \textit{Fed. R. Civ. P. 26(b)}, provides in pertinent part that "it is no ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."

The notes of the Advisory Committee on the Civil Rules make it clear that discovery is to be broad and should cover not only evidence for use at trial but also evidence inadmissible at trial that will lead to the discovery of admissible evidence. A broad search must be permitted for any matters which may aid a party in preparing his case. "[A]dmissibility at trial should not be the test as to whether the information sought is within the scope of proper examination. Such a standard unnecessarily curtails the utility of discovery practice." \textit{Advisory Committee on Rules for Civil Procedure, Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States} 34 (1946).

\textsuperscript{82} United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).
manufacture evidence and invite perjury, (2) knowledge of witnesses' names will afford defendant the opportunity to bribe, intimidate, or suborn to perjury these witnesses, (3) there is no reciprocity and defendant may deny discovery to the prosecution by asserting his constitutional right against self-incrimination, (4) there are neither the funds nor the manpower available to effectuate an effective discovery program, and (5) the existing informal discovery procedures are sufficient. These arguments have been made many times over and they are basically self-explanatory. However, some discussion will shed light on the validity of these claims.

A. The Character of the Defendant: A Bar to Discovery

The character of the defendant is often utilized as a justification for denying him full and open discovery. It is argued that whereas the parties in a civil trial are usually law abiding citizens peacefully seeking a resolution to disputes involving money or property, defendants in a criminal proceeding are often desperate enough to have witnesses threatened or removed and are capable of doing so. The criminal defendant generally has much more to lose than the civil litigant — his liberty and sometimes his life. Given the vicious nature of many crimes, prosecutors argue, an added transgression against society is not unreasonable, especially if it will result in an acquittal. Implicit in this line of reasoning is the assumption that all accused are guilty, that to avoid inevitable conviction they will take any measures necessary and that existing laws and sanctions against perjury and bribery are ineffective as deterrents to such activity. The argument further implies that by denying the criminal defendant early discovery this unlawful activity will be abrogated.


85. State v. Tune, 13 N.J. 203, 210-11, 98 A.2d 881, 884 (1953). A major concern of prosecutors and police investigators is that persons who know their names will be made available to the defendant will refuse to cooperate for fear of retribution. See Discovery in Criminal Cases, 44 F.R.D. 481, 485 (1968) (remarks of Stephen E. Kaufman).


87. See Flannery, supra note 83, at 78.

88. Id.

89. See Discovery in Criminal Cases, 44 F.R.D. 481, 485 (1968) (remarks of Mr. Stephen E. Kaufman).

90. This same argument is used as a justification in favor of extending defendant's rights of discovery, See generally Brennan, supra note 5; Everett, Discovery in Criminal Cases — in Search of a Standard, 1964 Duke L.J. 477; Fletcher, Pretrial Discovery in State Criminal Cases, 12 Stan. L. Rev. 293 (1960); Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L.J. 1149 (1960); Krantz, Pretrial Discovery in Criminal Cases: A Necessity for Fair and Impartial Justice, 42 Neb. L. Rev. 127 (1963); Louisell, supra note 65; Traynor, supra note 3.

91. Goldstein, supra note 90, at 1193.
There is no real attempt by commentators favoring liberal discovery to deny the possibility of perjury and witness-tampering occurring in criminal cases; but this same abuse is a possibility in civil litigation, especially in cases involving actions for misrepresentation or other related torts which call a civil defendant's integrity directly into question. The two relevant questions, therefore, which must be considered are whether there is a substantial relationship between early discovery and perjury or witness-tampering② and whether the possibility of perjury or witness intimidation justifies denial of effective discovery to all defendants. Even if there is a relationship between early discovery and perjury or witness-tampering in the civil area③ the result has not been a restricting but a broadening of discovery.

It could validly be argued that in criminal discovery there exists a substantial relationship between these elements. But practically speaking, most criminal defendants are indigent④ and represented by court appointed counsel.⑤ In short they are not in a financial position to bribe witnesses, and, because they are often unable to post bond,⑥ would not have an opportunity to intimidate prospective witnesses. Furthermore, most reasonable men would agree that a court appointed defense attorney will not risk his reputation and career by indulging in unethical practices. Therefore, whatever the integrity of the accused, his counsel would serve as a check on abusive and unethical activity.⑦

Naturally the danger of these abuses is higher in cases involving organized crime or wealthy defendants. It is submitted, however, that opportunity for discovery, or lack of it, would have very little effect on this activity. When elaborate resources or a criminal organization are available to the defendant, restrictive discovery would not deter his witness-tampering. It is, furthermore, reasonable to assume that any guilty defendant who desires to commit perjury will find a way based on his personal knowledge of his acts, regardless of whether further discovery

② The argument has been made that a relationship between early discovery and perjury or witness intimidation has not been satisfactorily shown to exist. One court dismissed the theory summarily: "The point is built one-sidedly of untested folklore." United States v. Projansky, 44 F.R.D. 550, 556 (S.D.N.Y. 1968).

③ Supreme Court Justice William J. Brennan, Jr., has responded to the perjury argument:

I should think rather that its complete fallacy has been starkly exposed through the extensive and analogous experience in civil causes where liberal discovery has been allowed and perjury has not been fostered. Indeed this experience has suggested that liberal discovery, far from abetting, actually deters perjury and fabrication.

Brennan, supra note 5, at 290-92.

④ In 1951, it was estimated that 60% of those charged with criminal offenses could not afford to employ counsel. E. Brownell, Legal Aid in the United States 83 (1951).

⑤ See note 94 supra.

⑥ See LaFave, Alternatives to the Present Bail System, 1965 U. Ill. L.F. 8, 10-12, wherein the author refers to the Report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice (1963). Some sample figures of persons unable to make bail contained in the report are: St. Louis, 79%; Baltimore, 75%; Miami, 71%; San Francisco, 57%; Boston, 54%. Id. at 10.

⑦ See Brennan, supra note 5, at 291-92.
is provided. The perjury argument has become eroded over the years. The fear of perjury has diminished perhaps because of the realization that such abuses resulting from broad discovery can reasonably be expected in only a small minority of criminal cases and certainly should not serve as a justification for greatly hindering all criminal defendants.

### B. The Lack of Reciprocity

In answer to the argument that open discovery works in the civil area, therefore, it would work in criminal cases, the opponents of liberal discovery contend that the civil experience is not relevant to the criminal field. Several arguments have been advanced. First, the basis for pre-trial discovery in civil cases — mutual exchange of evidence — is not present in the criminal case. By the same token, it is argued, while a civil trial is a search for truth by both sides, a criminal trial may not be. The Government has a duty to protect the innocent and prosecute the guilty, but the defense lawyer's only duty is to insure a fair trial and require the Government to prove guilt beyond a reasonable doubt. It is submitted that this "search for truth" argument is untenable. Ethical considerations aside, the "search for truth" has become the goal of criminal justice, if not the reality. Cooperation between prosecutor and defense counsel has been imposed by the United States Supreme Court in Brady v. Maryland to insure the emergence of the truth.

Second, the defendant's constitutional immunities — the right to remain silent — makes reciprocal disclosure impossible, and thereby places the prosecution at a disadvantage. This second argument has been attacked for two primary reasons; the protection which constitutional immunity affords a criminal defendant is exaggerated and the defendant often pays for his silence if he chooses to exercise his privilege.

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98. Pye, supra note 83, at 91.
100. See Flannery, supra note 83, at 78.
101. Id. Mr. Flannery cites motions to suppress illegally seized evidence as a typical example of counsel's duty to his client which results in suppression of the truth. Id. See generally Freedman, Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 Mich. L. Rev. 1469 (1966).
103. See note 86 supra.
104. Goldstein, supra note 90, at 1185. This argument was articulated by Judge Learned Hand in State v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923). See text accompanying note 82 supra. Judge Hand's position has been rejected as irrelevant for assuming a "sporting theory of justice" — a theory no longer acceptable under the modern view of criminal justice as a search for truth. See generally Brennan, supra note 5.
105. Goldstein, supra note 90, at 1186. Under new Rule 16(c), if the court grants defendant's discovery motion under Rule 16(a) (1) or (b), it can condition defendant's discovery by requiring defendant to permit the Government discovery of certain items. The constitutional problems raised by this reciprocity condition are noted in 39 F.R.D. 69, 272-78 (1966). See also Orfield, The Federal Rules of Criminal Procedure, 10 Str. Louis U.L.J. 445, 450-51 (1966); Wright, supra note 2, at 327-28.

The defendant is required to disclose only material he intends to introduce at trial; and, therefore, disclosure in advance merely regulates the presentation of his case and does not violate any constitutional privilege of the defendant. See
It has been asserted that, even with the expansion of the scope of
discovery rights of the accused and his constitutional rights in general,
the defendant does not enjoy every advantage of, and certainly no more
advantages than, the state. The exclusionary rule of evidence, as enun-
ciated in *Weeks v. United States*, is only of limited aid to the innocent
defendant or to the guilty defendant who neither confessed nor possessed
incriminating evidence. Furthermore, the protection the Constitution
affords the defendant against self-incrimination can be ineffective. Usually
a defendant must take the stand if he hopes to be acquitted; and when
he does so he is subject to revealing cross-examination by a well-informed
prosecutor who could impeach his credibility by bringing in evidence of
defendant's prior convictions. If he avails himself of his privilege not
to testify, his failure to take the stand is so conspicuous that it is bound
to have an adverse effect on the jury, thereby requiring him to risk a
piercing cross-examination to counteract this effect.

Many jurisdictions have rules requiring the defendant to plead spe-
cially the defenses of insanity and alibi. Furthermore, the accused must
submit to various physical examinations by the state in its search for
incriminating data. The state also has the power to make reasonable
searches and seizures for evidence and the power to subpoena wit-
nesses. In addition, the prosecutor has all the scientific and manpower
resources of both his department and various federal, state and local law
enforcement agencies behind him while most criminal defendants are left
virtually unaided. The indigent defendant is limited by the size of the

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Traynor, supra note 3, at 247-48. If, however, the disclosure is constitutionally pro-
tected, may the benefits of discovery under Rule 16 be conditioned on the waiver of
these constitutionally protected rights? ABA STANDARDS, supra note 7, at 45. See,
e.g., Sherbert v. Verner, 374 U.S. 398, 403-06 (1963); See generally Louisell, Criminal
Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma, 53 CALIF.
L. REV. 89 (1965).

106. See generally Goldstein, supra note 90.

107. 232 U.S. 383 (1914). The Court held that evidence obtained as a result of an
illegal arrest, search or seizure, conducted by federal authorities was inadmissible in
any federal court. In Mapp v. Ohio, 367 U.S. 643 (1961), it was held that the
exclusionary rule was part of the fourth amendment and therefore applied to the
states through the fourteenth amendment.

108. Pye, supra note 83, at 89.

109. See Id.

110. See Goldstein, supra note 90, at 1186 & n.123. Based on statistics kept by the
Administrative Office of the United States Courts for the year 1956 it was shown that
in:

- a little over 99 per cent . . . of all the criminal cases tried in the eighty-six
judicial districts at the federal level, defendants who did not take the stand were
convicted by juries. . . . The fact of the matter is that a defendant who does not
take the stand does not in reality enjoy any longer the presumption of innocence.

Williams, The Trial of a Criminal Case, 29 N.Y.S.B. BULL. 36, 42 (1957).

111. For a typical rule compelling notice of alibi and insanity defenses, see N.J.R.
§§ 3:11 & 3:12. Failure to give the required notice can result in defendant being barred
from proving the alibi. See Hill, supra note 3, at § 11:02(3).

112. See Schmerber v. California, 384 U.S. 757 (1966). See also Garber, The
Growth of Criminal Discovery, 1 CRIM. L.Q. 3, 5 (1962); Goldstein, supra note 90,
at 1189-90 & nn. 133-36.


114. See Goldstein, supra note 90, at 1183 & n.111.
Defender Association's budget and other defendants are limited by their own resources. Not only is considerable use made of the accused by the police and prosecution, but all witnesses for both sides are subjected to interrogation by the prosecution before trial either voluntarily or by being subpoenaed to appear before the grand jury.\textsuperscript{115} If it is done before the grand jury, in effect, the prosecutor conducts a "deposition" without the presence of either the accused or his counsel.\textsuperscript{118} While the minutes of the grand jury hearing are readily available to the prosecutor, it is extremely difficult for the defendant to acquire them for examination.\textsuperscript{117}

\textbf{C. The Effectiveness of Informal Procedures}

A persuasive argument against any drastic changes in criminal discovery is that reform toward liberalization is actually not necessary. In practice there is an informal, free exchange of information between the prosecutor and the defense attorney. Prosecutors as a matter of good policy open their files to defense counsel, refusing this privilege only when they believe the particular defense attorney is not to be trusted with the information or will otherwise abuse the privilege.\textsuperscript{118} This practice leads to elimination of unnecessary issues, guilty pleas when the defense attorney is shown the strength of the state's case, and dismissals when the defense attorney exhibits an airtight defense. In effect, this argument seems to implore the rule makers to leave well enough alone and insists that the system functions well enough for those who have to work within it.

However, the fallacy of this argument is that the vast majority of defense discovery is dependent on an act of good will by the prosecutor.\textsuperscript{119} All too often a "trustworthy" defense attorney is an amiable plea negotiator, or one who does not give the assistant district attorneys a difficult time.\textsuperscript{120} A defense attorney who uses the discovered information to construct a solid defense and prepare effective cross-examination of state's witnesses could very well be labeled "untrustworthy" and banned from the files.\textsuperscript{121} The opportunity for inequality under this system is unlimited, and makes more urgent the need for consistent, pervasive, and formal pretrial discovery. The defendant's discovery should not be subject to the

\textsuperscript{115} See Goldstein, supra note 90, at 1191. This does not mean that the prosecution can compel defendant to disclose the names of his witnesses.

\textsuperscript{116} See Goldstein, supra note 90, at 1191. See generally Blair v. United States, 250 U.S. 273, 279-81 (1919).

\textsuperscript{117} See pp. 662-63 supra.

\textsuperscript{118} This argument is discussed in Pre-Trial Discovery in Criminal Cases, 31 Brooklyn L. Rev. 320, 329 (1965).

\textsuperscript{119} In a survey, Assistant United States Attorneys and defense counsel were asked to indicate the factors they thought most greatly affected the prosecutor's decision to grant informal discovery. Of nine categories the one most often cited as the factor favoring discovery was the "United States Attorney's personal acquaintance with prosecutors polled and eighty-eight per cent of the defense counsels polled concurred in this factor." Discovery in Federal Criminal Cases, 33 F.R.D. 47, 116 (1963).

\textsuperscript{120} See Pye, supra note 83, at 85.

\textsuperscript{121} Id.
whim of the prosecution; and the decision of what evidence should be made available to defendant should not hinge on the prosecutor's opinion of either the accused or his counsel.

D. A Positive Case for Liberal Discovery

It could be argued that defendant needs to discover only the basic case against him and certain evidence which will be used against him at trial. Given the prosecutor's heavy burden of proof, effective rebuttal by defendant should be all that is necessary to win acquittal; and therefore, discovery should be geared to this rebuttal on cross-examination. However, in order for the accused to present his strongest and most effective defense, he must have all the evidence before him. Discovery, therefore, must go beyond the function of preparing for cross-examination and impeachment and serve the positive function of providing defendant with the information from which to construct an affirmative case.

The provisions for discovery by the defendant that do exist are generally concerned with perpetuation of testimony and matters not crucial to the charge122 and are, therefore, ineffective123 in helping the accused's attorney prepare a complete defense. The guilty defendant at least has a basic knowledge of the crime he is charged with, but the defendant who is innocent has no idea of the "facts" and will be of no help to his attorney in preparing his defense. Similarly, the defendant who was intoxicated at the time of his criminal act or the defendant suffering from mental illness will be of no aid to his attorney.124 These impediments aside, the typical criminal defendant is not gifted with an ability to accurately remember necessary details of his act and surrounding circumstances; nor does he possess the legal acumen required to sort out and analyze those facts which are critical to a determination of guilt, innocence, or mitigation.125 His attorney must be able to get this information from some source other than the accused.128

It has also been urged that the entire argument for liberal discovery could be justified on one premise:

[A] defendant whether guilty or not should be entitled to a fair trial. If freedom of access to information is a fundamental ingredient of this right, he must be entitled to the type of discovery which will give him this access — without reference to what other advantages the law may provide him.127

122. See Goldstein, supra note 90, at 1181. For example, Fed. R. Crim. P. 15, limits the taking of depositions to situations where the witness will be otherwise unavailable at trial.
123. Id.
124. See Pye, supra, note 83, at 82-83.
125. Id. at 83.
126. Broad discovery is necessary to enable defense counsel to effectively cross-examine state's witnesses especially when defendant is indigent and cannot finance private investigation. In order to adequately advise his client how to plead, counsel must be able to discover the facts of the case. Id.
127. Pye, supra note 83, at 90. See ABA Standards, supra note 7, at 43; Goldstein, supra note 90; Louisell, supra note 65; Developments in the Law — Discovery, 75 Harv. L. Rev. 15.
IV. Models For Reform

Thus far an attempt has been made to expose the various procedural deficiencies of pretrial criminal discovery, to examine certain proposals for reform, and to evaluate the policy arguments advanced on either side of the issue of liberalizing discovery for the defendant. The remainder of this Comment will deal with discovery procedures as practiced in England, California, New Jersey, and Vermont in an attempt to draw on the discovery experiences of these jurisdictions in arriving at a viable solution to the problems of pretrial criminal discovery raised above.

A. The British Committal Proceeding: Some Answers

"The English preliminary hearing-deposition procedure is the quintessence of discovery — indeed to many American defense lawyers, including the federal criminal practitioner, it is the very ideal of discovery." This general concept of the British committal proceeding has prompted commentators to advocate expansion of our own preliminary hearing based on its British counterpart as the appropriate method to affect significant reform of pretrial criminal discovery. A brief sketch of the committal proceeding in England in relation to its discovery function will help to place their faith in perspective.

The dual function of the American preliminary hearing, a device for establishing probable cause to bind over the accused for the grand jury and witness discovery, is also a characteristic of the British committal proceeding. However, in Britain the discovery function has replaced the screening function as the proceeding's primary purpose. The breadth of required disclosure would draw violent protest from the traditional American prosecutor. The prosecution in England is required to produce at the committal proceeding all the witnesses and evidence intended for use at trial. To encompass all evidence discovered by the prosecution subsequent to the proceeding, the British prosecutor is required to serve the defendant with a notice of additional evidence. In recent years the scope of the notice of additional evidence has been enlarged and, with the defendant's consent, much evidence traditionally disclosed at the proceeding can be disclosed via a notice of additional evidence. This trend


129. Louisell, supra note 65, at 64-65.

130. Compare Goldstein, supra note 90, at 1193, with Rezneck, supra note 2, at 1303-04 & nn. 98 & 99.


133. See P. Devlin, supra note 128, at 93; A. Krulwich, supra note 128, at 31; Louisell, supra note 65, at 66 & n.38. See for comparison Fed. R. Crim. P. 16(g).
served the practical function of expediting what can otherwise be a very tedious and time consuming process. In addition, British prosecutors and defense attorneys utilize informal agreements as a means of discovery in much the same manner as American prosecutors and defense attorneys do. The value of the committal proceeding goes beyond the discovery of material evidence. Not only does the defendant obtain a fairly comprehensive view of the government's case, but the chief witnesses for the prosecution are subjected to careful scrutiny by defense counsel and counsel can "judge their potential for damage by demeanor as well as testimony."

The presence or absence of counsel at the proceeding ordinarily has little effect on whether or not the defendant secures a discharge. The value of counsel is in maximizing the effectiveness of the proceeding as a discovery device. It was noted in a field observation of the committal proceeding that the defense rarely called witnesses or argued strongly to avoid committal. Cross-examination was a much more frequent practice of the defense counsel, and even if defense counsel took no active part in the proceeding he took "copious" notes. With respect to discovery, therefore, the importance of counsel at the committal proceeding is apparent. As to whether legal aid will be provided, the seriousness and complexity of the particular case is weighted against the cost to the public. When the case is routine or the defendant has confessed to the police and will plead guilty at trial, counsel can do little at this early pretrial stage and is considered a luxury.

The English procedure is not as effective as it might be, limiting evidence available for disclosure to those items which are admissible at trial and which the prosecutor intends to offer. This limitation excludes from discovery much information needed to adequately prepare for trial. While the English committal proceeding is not a panacea for securing all of defendant's discovery needs, it has been suggested that it could provide a valuable model for reforming the American preliminary hearing into an effective discovery device. However, a closer analysis of the operation of this procedure will uncover certain inherent difficulties in implementing this reform.

135. See Louisell, supra note 65, at 65:
The process of recording the substance of each witness's testimony, then reading it to him to procure his signature while laborious and tedious, produces full-fledged depositions.
136. See A. Krulwich, supra note 128, at 32; Louisell, supra note 65, at 67 & n.42.
137. Id. at 34.
138. Id. at 37.
139. Id.
140. Id. at 40.
141. Id. at 41.
142. Id.
143. Id.
144. This is the same limitation found in the Advisory Committee's proposed standards. ABA Standards, supra note 7, at § 2.1(a)(i).
145. See Louisell, supra note 65, at 66.
B. The Operation Of The Preliminary Examination

Formally, the preliminary examination's raison d'être is to function as a post-arrest, pretrial screening device to determine if probable cause exists to believe that the accused committed the crime charged so that he may be incarcerated or required to post bond to insure his appearance at subsequent stages of prosecution.\(^{147}\) As a practical matter, the hearing is not very effective toward this end.\(^{148}\) In most jurisdictions it is a sufficient showing if the prosecution presents basic evidence in support of each element of the offense.\(^{149}\) As a rule defense counsel is either not present or ill-prepared to effectively test the sufficiency of the evidence against the accused;\(^{150}\) and, therefore, the prosecution can avoid going beyond a token presentation of evidence and minimum exposure of witnesses.

Apart from its screening function, the preliminary examination has been recognized as an important discovery device for the defense by commentators\(^{151}\) and courts\(^{152}\) alike. By hearing the prosecution's witnesses


\(^{148}\) See Goldstein, supra note 90, at 1166–69. For historical development of preliminary examination, see Comment, supra note 147, at 1416–19.

\(^{149}\) See Goldstein, supra note 90, at 1166.

\(^{150}\) Id. at 1167.

\(^{151}\) See generally Amsterdäm, Segal & Miller, supra note 3, at §§ 124–47; Goldstein, supra note 90, at 1166–69; Reznek, supra note 3, at § 10.06[2]; Note, 51 Iowa L. Rev. 164 (1965); Comment, supra note 147; E. Barrett Prettyman Fellows, 1965–1966, The Preliminary Hearing In The District Of Columbia 7–8 (1967), in which it was stated that:

"[t]here is currently a judicial dispute as to whether discovery is another recognized purpose of a preliminary hearing. From the perspective of the defense counsel, however, there is no doubt that the hearing is a critical tool in trial preparation. If used properly, the crucial facts of the government's case . . . can be discovered. Moreover, since the hearing is transcribed or recorded, the testimony is preserved for potential trial use in refreshing recollection or impeachment. For these reasons, preliminary hearings should never be waived."

\(^{152}\) For decisions which recognize the separate functions of the preliminary hearing and the grand jury indictment by holding denial of preliminary hearing is not cured by a supervening indictment, see Ross v. Sirica, 380 F.2d 557 (D.C. Cir. 1967); Dancy v. United States, 361 F.2d 75 (D.C. Cir. 1966); Blue v. United States, 342 F.2d 894 (D.C. Cir. 1964), cert. denied, 380 U.S. 944 (1965); United States ex rel. Wheeler v. Flood, 269 F. Supp. 194 (E.D.N.Y. 1967).

Several other decisions have discussed the preliminary hearing as affording defendant certain rights required under due process, i.e., an attorney who is instrumental in fulfilling the discovery function and protecting the constitutional rights of the defendant. See Pointer v. Texas, 380 U.S. 400 (1965); White v. Maryland, 373 U.S. 59 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961).

The discovery function of the hearing needs judicial recognition if the hearing is to be effective. This "unofficial" function "has more claim to judicial recognition than the 'acquittal' function because, although not required by the legislated purpose of preliminary hearings, it is also not inconsistent with that purpose." Amsterdäm, Segal & Miller, supra note 3, at § 133. One lower court took a step in this direction by enforcing the right to a preliminary hearing by reversing a valid conviction for no other reason but that a preliminary hearing had been denied. Manor v. State, 221 Ga. 866, 148 S.E.2d 305 (1966).

In Blue v. United States, 342 F.2d 894 (D.C. Cir. 1964), discovery was accepted, as a result of an ineffective preliminary examination, and the District of
and cross-examining them, the defense attorney can learn at least enough about what he will have to face at trial to avoid complete surprise. By observing the prosecution's witnesses on the stand at the preliminary examination the defense attorney can gain a subjective feel for the strength of their testimony and their general demeanor. This subjective knowledge can prove important in the approach the defense counsel will take toward these witnesses at trial, and is something he cannot get from a written statement. This hearing also serves to perpetuate effective cross-examination of witnesses and lay the groundwork for impeachment of credibility or testimony at trial.

In sum, the preliminary examination, if it were effectively administered as a discovery device, would serve three functions for the defendant: to compel the state to meet its burden of proof or have the charge against the accused reduced or dismissed; to provide effective discovery of the state's evidence; and to perpetuate testimony for use as impeachment evidence at trial. However, to be effective three requirements would have to be provided: a greater evidentiary burden on the state to satisfy the discovery function of the examination apart from its screening function; the presence of counsel; and adequate preparation by defense counsel so

Columbia Legal Aid Act, 2 D.C. Code §§ 2201–2210, was interpreted as requiring that the accused be advised of the availability of counsel at that time. It has generally been thought that the purpose of a preliminary hearing is to afford the accused . . . (2) a chance to learn in advance of trial the foundation of the charge and the evidence that will comprise the government's case against him. Id. at 901. The court in Washington v. Clemmer, 339 F.2d 725 (D.C. Cir. 1964), stated that under Fed. R. Crim. P. 5(c), the accused is entitled to cross-examine all witnesses at the preliminary examination upon whose testimony the government will rely on at trial.

153. See Amsterdam, Segal & Miller, supra note 3, at § 139. See also Pointer v. Texas, 380 U.S. 400 (1965).

154. See Amsterdam, Segal & Miller, supra note 3, at § 139.

155. Id.

156. Id.

157. It has been argued that the “skeletal” nature of the preliminary examination is preserved by the absence of counsel. See Goldstein, supra note 90, at 1166–67. Because binding over is recognized as the function of the hearing, very little thought is given to the rights of the accused at this early stage.

The presence of counsel could be the greatest factor in transforming the preliminary examination from a frequently waived, ineffective proceeding into a valuable step in the criminal process. See Rezneak, supra note 2, at 1305 & n.100.

Two cases are particularly significant to the question of providing counsel at the preliminary examination. In Hamilton v. Alabama, 368 U.S. 52 (1961), the Court held that the defendant had been denied due process when he pleaded not guilty at arraignment on an indictment for a capital offense without the assistance of counsel and without having waived his right to counsel. In White v. Maryland, 373 U.S. 423 (1963), the Court in a per curiam opinion relied on Hamilton and stated that defendant's plea of guilty at the preliminary hearing made without the assistance of counsel and the subsequent use of that guilty plea as evidence at trial deprived defendant of due process of law. In effect, under these facts, the preliminary hearing was a “critical stage” and counsel was required. See Pointer v. Texas, 380 U.S. 400 (1965), in which the Court held that admission into evidence of testimony taken at the preliminary examination at which defendant, without the assistance of counsel, was unable to effectively cross-examine state's witnesses denied him his right to confront his accusers.

The Court, therefore, has decided cases on the formal aspects of the hearing—

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that he may make maximum use of the hearing.\textsuperscript{188} A further obstacle to the effectiveness of the preliminary examination involves tactical evasion of the hearing by the prosecution through a continuance until a grand jury indictment has been returned.\textsuperscript{189} Once the prosecution has secured a grand jury indictment, most courts will not permit a preliminary examination on the basis that a need for one no longer exists;\textsuperscript{190} if an indictment has been returned, certainly there is no need to test the sufficiency of the evidence at a preliminary examination.

There are also practical difficulties in expanding the preliminary hearing into an effective discovery device. Three very practical and immediate arguments against such an expansion are: lack of time to properly achieve its purpose as a discovery device; lack of manpower to properly administer the hearing; and lack of funds to institute such a reform and sustain it once instituted.

It is safe to generalize that a tremendous backlog exists in the criminal courts, making time of the essence and placing a premium on time-saving devices. To administer an expanded preliminary examination would require the participation of a judge for what could be a sustained period of time, in addition to requiring the efforts of the prosecutor and defense attorney before the hearing to adequately prepare for it as well as during the hearing. Assuming the ideal — that funds and resources were available for such expansion — there is a very real danger of an expanded preliminary hearing becoming a "trial before the trial." For these reasons the preliminary hearings would appear not to be the best vehicle for pretrial discovery.

\textsuperscript{188} See generally Weinberg & Weinberg, The Congressional Invitation To Avoid the Preliminary Hearing: An Analysis of Section 303 of the Federal Magistrate's Act of 1968, 67 Mich. L. Rev. 1361 (1969); Comment, supra note 147, for a thorough analysis of this method of avoiding the preliminary hearing and a proposed remedy.

\textsuperscript{189} See Crump v. Anderson, 352 F.2d 649 (D.C. Cir. 1965), in which the court affirmed the dismissal of the preliminary examination after an indictment had been returned during an eleven day delay while defendant awaited appointment of counsel. But see note 152 supra.

The characterization of the preliminary hearing as a device to find probable cause rather than as a discovery device and failure to distinguish its purpose from that of the grand jury hearing would insure that courts will continue to find no need for a preliminary hearing if a grand jury indictment has been returned. See Comment, supra note 147 at 1425-26.
C. California, New Jersey and Vermont: 161 Three Solutions

A relatively broad discovery policy operates in California largely as the result of appellate decisions. 162 A defendant may discover the names and addresses of witnesses, 163 photographs, 164 results of scientific and other investigations, 165 and statements of witnesses to the police 166 or prosecutor. 167 All the defendant must show, generally, is inability to readily obtain the information through his own efforts, ignorance of the contents of the material sought, and that the material may aid him in preparation for trial. 168 Once defendant has made such a showing, discovery is available as a matter of right in the interest of a fair trial, 169 absent the prosecution demonstrating that disclosure will lead to abuse. 170

Despite California's apparent liberality, especially in the area of witness discovery, its discovery procedures may still fall short of achieving the pretrial discovery necessary to meet the expanding concept of a fair trial. 171 As noted, the discovery rights of the defendant are judicially made, and therefore the scope of these rights will be largely determined by the views on discovery of the trial judge before whom each individual defendant must appear. 172 In addition, California is reluctant to permit pretrial discovery depositions 173 to be taken by defense counsel, and therefore, lags behind several more progressive jurisdictions. 174 While California is no longer the vanguard of criminal discovery, it is illustrative of the effectiveness of a reform-minded judiciary in solving certain discovery problems.

Following the direction of Chief Justice Weintraub after the New Jersey Supreme Court's decision in State v. Tate, 175 a special judicial review.

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161. For a partial list of other states which have updated their criminal discovery rules, see note 7 supra.

162. See Murphy, supra note 3; Traynor, supra note 3, at 243-50.

163. E.g., People v. Lopez, 60 Cal. 2d 223, 384 P.2d 16, 32 Cal. Rptr. 424 (1963), cert. denied, 375 U.S. 994, 376 U.S. 939 (1964) (identity of prosecution witnesses withheld until twenty-four hours before they were to testify on showing that they might be subject to tampering). For discussion, see Traynor, supra note 3, at 244.


169. See Hill, supra note 3, at § 11.03[3].


171. See Hill, supra note 3, at § 11.04[1]; Murphy, supra note 3, at 13.


174. See discussion supra note 680, infra.

seminar on criminal discovery was held for the express purpose of liberalizing New Jersey's criminal discovery procedures.

The New Jersey committee\textsuperscript{176} provided for mandatory disclosure of certain items of evidence. The defendant, upon motion by him, \textit{must} be permitted access to any \textit{relevant}:

(i) designated books, tangible objects, papers or documents obtained from or belonging to him; (ii) exculpatory information or material; (iii) any written or recorded statements or confessions made by the defendant or copies thereof; (iv) defendant's grand jury testimony if a transcript thereof has already been obtained by the prosecuting attorney . . . and if not, the court shall order such transcript to be prepared and a copy thereof furnished to defendant . . . (v) the results of physical or mental examinations and of scientific tests . . . made in connection with the matter . . . (vi) reports or records of prior convictions of the defendant.\textsuperscript{177}

The Rule left other items up to the discretion of the court upon the defendant's showing of an inability to obtain the material elsewhere following a good faith effort and a need to discover such material.

\textit{Absent} a showing of good cause to the contrary the court shall order the prosecuting attorney to permit the defendant to inspect . . . books, papers, documents, or tangible objects . . . which are within the possession, custody or control of the State.\textsuperscript{178}

Under a further provision the court \textit{may} direct the prosecuting attorney to make available to the defendant witnesses' names, addresses, statements, and grand jury testimony.\textsuperscript{179} In addition, the court may order the prosecuting attorney to cooperate with the defense attorney in his efforts to procure interviews with state's witnesses.

The committee, while affording broad discovery in its proposals, was reluctant to permit defendant the unrestricted right to take depositions of

\textsuperscript{176} For extensive discussion of the new rules, see Report of N.J. Supreme Court's Special Committee on Criminal Discovery, 90 N.J.L.J. INDEX 214 (April 6, 1967) [hereinafter cited as \textit{N.J. Special Committee Report}].

\textsuperscript{177} N.J.R. \textsection 3:13-3(a), adopts the Committee's proposal for mandatory discovery with minor variation. See \textit{N.J. Special Committee Report}, supra note 176.

\textsuperscript{178} N.J.R. \textsection 3:13-3(b). See \textit{N.J. Special Committee Report}, supra note 176.

\textsuperscript{179} See N.J.R. \textsection 3:13-3, which permits defendant wide witness discovery absent a showing of cause to deny this discovery by the prosecution and conditioned on defendant's willingness to disclose similar information. The rule provides for discovery of:

(1) The names and addresses of all persons known to the prosecution to have relevant evidence and a list of persons who will be used by the state as witnesses at trial;

(2) The statements made by such persons and any relevant records of prior convictions; and

(3) The grand jury testimony of such persons.

For a discussion on the discovery of witness statements, see Rezneck, supra note 3, at \textsection 10.02[5][b].
It justifies its reluctance in light of the broad witness discovery already provided under proposed rule 3:13-3(c). However, if the court should conclude that depositions are to be permitted, the committee would require a showing that defendant made an unsuccessful attempt to obtain an interview with a witness and the witness made no recorded statement to the police or prosecutor, or the recorded statement furnished the defendant indicates a need for a deposition.  

The State of Vermont, in 1961, exhibited no such reluctance when it enacted a criminal deposition statute, the first in any state. The statute provides in pertinent part:

A respondent in a criminal cause at any time after the filing of an indictment, information or complaint, may take the deposition of a witness, upon motion and notice to the state and other respondents, and on showing that the witness’s testimony may be material or relevant on the trial or of assistance in the preparation of his defense . . . .

In its decision in *State v. Mahoney* the Supreme Court of Vermont left no doubt as to the application of the statute.

The legislature, by this enactment has granted a right of unlimited discovery to a respondent in a criminal cause. Whatever may be the opin-

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180. In *State v. Tate*, 47 N.J. 352, 221 A.2d 12 (1966), Chief Justice Weintraub, in addition to drawing distinctions with the civil deposition set forth three basic reasons for denying depositions:

1. The criminal process already overburdened to the point where a speedy disposition of the case is almost impossible, will be even more drawn out if depositions become a routine method of discovery;

2. Routine discovery by deposition would impose tremendous financial burdens on the state; and

3. The added burden of depositions on victims and other witnesses might discourage their cooperation.

*Id.* at 356-57, 221 A.2d at 14-15.

For an excellent review of the taking of criminal depositions, see *Hill*, supra note 3, at §§ 11.04[1]-11.04[4].

181. See *N.J. Special Committee Report*, supra note 176, at 214.

182. 5 VT. STAT. ANN. tit. 13, § 6721 (1961). For brief history of the evolution of the statute, see Langrock, *Vermont’s Experiment in Criminal Discovery*, 53 A.B.A.J. 732 (1967). *See Hill*, supra note 3, at §§ 11.04[1]-11.04[4]. In addition to Vermont, other states have adopted less far reaching deposition procedures. *Ohio Rev. Code Ann.* § 2945.50 (1965), provides basically that the defendant or prosecution may request to depose “any witness.” While no standard is formally required to determine when a deposition may be taken, the Ohio supreme court suggested that the trial judge in exercising his discretion may utilize “civil guidelines.” *State ex rel. Jackman v. Court of Common Pleas*, 9 Ohio St. 2d 159, 224 N.E.2d 906 (1967). *Tex. Code Crim. Proc. Ann.* art. 39.14 (1965), significantly extended this state’s partial discovery procedure by providing for pretrial inspection of the defendant’s written statements and the state’s chief evidence. *Tex. Code Crim. Proc. Ann.* art. 39.02 (1965), allows defendant to depose witnesses if he shows “good reason.” *Fla. R. Crim. P.* 1.220(f), affords the defendant a qualified right to depose any person “who may have information relevant to the offense charged . . . .” or information relevant to the accused’s defense. Indiana, like California, has developed its criminal discovery deposition procedure through appellate decisions evolving from *Burn’s Ind. Stat. Ann.* § 9-1610 (1956), a narrowly drawn perpetuation of evidence statute, to a relatively broad witness discovery procedure exceeded only by Vermont. If the state fails to show a “paramount interest” in nondisclosure, the trial court’s discretion is limited to curbing “fishing expeditions.” *See Howard v. State*, ___ Ind. ____, 244 N.E.2d 127, 128 (1969); *Hill*, supra note 3, at § 11.04[4].


184. *122 VT. 456, 176 A.2d 747 (1961).*
ion of the Justices of this Court, as individuals, as to the possible consequence of a legislative act, if the meaning is plain we cannot regard the consequences, for that would be assuming legislative authority.\textsuperscript{185}

A questionnaire was circulated among the Vermont bar concerning the effect of this deposition procedure on the state's criminal justice system. The conclusion was that the depositions decreased the likelihood of trial because it gave the defendant a chance to find out the actual strength of the state's case and removed the practice of "bluffing" thereby encouraging defense counsel and prosecutor to work together.\textsuperscript{186} According to one commentator, the evils\textsuperscript{187} envisioned when discovery was liberalized never materialized; and "virtually all of the experience available under the expanded discovery procedure has indicated an improvement in the administration of the criminal laws."\textsuperscript{188}

V. Effective Use of Pretrial Stages: A Proposal

The proposed Rule set forth below is an attempt to draw together what appears to be the most effective aspects of discovery procedures outlined above and to implement certain policy considerations. Since Rule 16 is a relatively progressive discovery rule and serves as a model for many jurisdictions, it will be utilized as the basic structure for the following proposal.

A. Proposed Revision of Rule 16\textsuperscript{189}

(a) Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony; Witness List and Statements; Prior Criminal Record of Witness; Favorable Evidence. Except as provided for in subsection (e), the court shall, upon motion of a defendant, order the attorney for the government to permit the defendant to inspect and copy or photograph any [relevant] (1) written or recorded statements or confessions made by the defendant or his co-defendant,\textsuperscript{190} or copies thereof, within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, (2) results or reports of physical or mental examinations made in connection with the particular case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, (3) recorded and unrecorded testimony of the defendant or his co-defendant\textsuperscript{191} before a

\textsuperscript{186} See Langrock, supra note 182, at 734.
\textsuperscript{187} See discussion pp. 668-70 supra.
\textsuperscript{188} See Langrock, supra note 182, at 734.
\textsuperscript{189} All proposed additions and revisions are noted in italics and important phrases which have been deleted are indicated in brackets. See supra note 2, for the text of present Rule 16. For an excellent analysis of Rule 16 and proposals for reform, see Judicial Conference, supra note 57, at 35-58.
\textsuperscript{190} See ABA Standards, supra note 7, at 58-61.
\textsuperscript{191} Id. at 70-71. See Bruton v. United States, 391 U.S. 123 (1968); Judicial Conference, supra note 57, at 36, 49.
grand jury, (4) the names and addresses of potential witnesses regardless of use at trial along with a brief but revealing transcription of any statement given to the prosecution that may aid defendant in preparation for trial\(^{192}\) within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known to the attorney for the government, (5) any prior criminal record of any potential witness,\(^{193}\) and (6) any favorable evidence\(^{194}\) which in any manner may aid the defendant in preparation for trial within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.

(b) Other Books, Papers, Documents, Tangible Objects or Places. Upon motion of a defendant the court [may] shall order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings, or places, or copies or portions thereof, which are within the possession, custody, or control of the government upon a showing [of materiality to the preparation of his defense and that the request is reasonable] that the request may aid the defendant in preparation for trial. [Except as provided in subdivision (a)(2), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. § 3500.]

(c) Discovery by the Government. [If the court grants relief sought by the defendant under subdivision (a)(2) or subdivision (b) of this rule, it may, upon motion of the government, condition its order by requiring that the defendant permit the government to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which are within his possession, custody or control, upon a showing of materiality to the preparation of the government's case and that the request is reasonable and which the defendant intends to produce at the trial.] Upon motion of the government the court may order the defendant to permit the government to inspect and copy or photograph scientific or medical reports, books, papers, documents,

\(^{192}\) See ABA Standards, supra note 7, at 56-58; Hill, supra note 3, at § 11.03(1); Judicial Conference, supra note 57, at 37, 46-47, 51-52; Fla. R. Crim. P. 1.220 (1968); N.J.R. § 3:13-3(c) (1969).


\(^{193}\) See ABA Standards, supra note 7, at 69-70.

\(^{194}\) See Brady v. Maryland, 373 U.S. 83 (1963); Judicial Conference, supra note 57, at 50-51.
tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within his possession, custody, or control, upon a showing of materiality to the preparation of the government's case and that the request is reasonable; and names and addresses of potential witnesses the existence of which is known or by the exercise of due diligence may become known, to the defense attorney.

(d) Time, Place and Manner of Discovery and Inspection. Unchanged.

(e) Protective Orders. The above sections notwithstanding, the following categories of evidence may be exempt from disclosure upon sufficient showing by a party that: (1) evidence, if disclosed, would significantly compromise the national security; (2) evidence, if disclosed, would significantly hinder a present investigation of a related criminal cause; and (3) reports, memoranda, and other tangible things are the product of an attorney's thinking process and reflect tactical information as opposed to evidentiary material.\(^{195}\)

Upon motion by the affected party, the court may permit that party to make such showing, in whole or part, in the form of a written statement to be inspected by the court [in camera]. If the court enters an order granting relief following a sufficient showing [in camera], the entire test of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the opposing party.

(f) Time of Motions. Unchanged.

(g) Continuing Duty to Disclose; Failure to Comply. Unchanged.

(h) A defendant at any time after the filing of an indictment, information or complaint may take the deposition of any witness upon proper motion to the court and notice to the government, and on a showing that the deponent's testimony may aid the defendant in preparation for trial.\(^{196}\)

### B. Commentary

The proposed statute utilizes the practice of informal discovery\(^{197}\) between prosecutor and defense attorney and makes it a formal requirement. There are four significant changes in proposed Rule 16(a) and (b): (1) mandatory rather than discretionary discovery;\(^{198}\) (2) defendant need

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195. For comparison, see Hickman v. Taylor, 329 U.S. 495 (1947); Hill, supra note 3, at § 11.03[2]; C. Wright, Federal Courts § 82 (1963); ABA STANDARDS, supra note 7, at § 2.6(a); Note, "Work Product" in Criminal Discovery, 1966 WASH. U.L.Q. 321.


197. See pp. 672-73 supra.

198. See note 58 supra. The Advisory Committee of the Judicial Conference makes mandatory government disclosure of: (1) statement of defendant; (2) statement of
not show that the evidence he seeks is relevant in the strict sense of the term; (3) no "at trial" limitation on the evidence the prosecution must disclose; and (4) expanded categories of evidence discoverable by the defendant.\textsuperscript{199} By requiring broad, early discovery the purposes to be achieved are to avoid delays at trial, to facilitate proof and proper preparation for trial, and to encourage plea negotiation and early disposition of the case.

By deleting the exercise of the court's discretion at the initial request for disclosure and requiring a party to come forward with a sufficient showing of cause under the proposed protective order provision, the revised statute greatly inhibits the emasculating effect of "the court's discretion" on pretrial criminal discovery.\textsuperscript{200}

The proposed Rule has deleted the familiar evidentiary limitation of relevance and, adopting the Vermont approach, requires only that the evidence sought in some manner affect the defendant's case.\textsuperscript{201} The difficulties of requiring a show of relevance at the pretrial stages have been discussed previously.\textsuperscript{202} The ABA Advisory Committee, while recognizing these problems, justifies the inclusion of a "relevancy" standard by asserting that the concept is a familiar one and discovery would be unworkable without this criterion.\textsuperscript{203} The standard set forth in proposed Rule 16(a) and (b) hopefully will insure that the prosecutor and trial judge will not be "stingy" in interpreting the meaning of "relevance," as requested by the Advisory Committee.\textsuperscript{204}

The "at trial"\textsuperscript{205} limitation is not included in the proposed revision of Rule 16. In addition to avoiding surprise at trial and providing defendant with the opportunity to effectively rebut government evidence, discovery should aid defendant in preparing a positive defense to the charge. This function of discovery requires disclosure of evidence which the Government would not be inclined to use at trial, i.e., a witness's inability to identify the defendant or a description of the perpetrator of the act which does not meet the physical appearance of the defendant.\textsuperscript{208} There are, in addition, various bits of evidence possibly insignificant to the prosecution, which could provide the defendant with a valuable lead or necessary link in his chain of proof. For these reasons an "at trial" limitation has an extremely restrictive effect on discovery and is eliminated from the Rule.

codfendant; (3) defendant's prior record; (4) documents and tangible objects; (5) reports of examinations and tests. Discovery of witness lists is provided for, but left to the discretion of the court. Judicial Conference, supra note 57, at 35-37. 199. The most important category being discovery of witness lists and statements which is the area of greatest deficiency in present discovery rules.
\textsuperscript{200} See pp. 664-65 supra.
\textsuperscript{201} See State v. Mahoney, 122 Vt. 456, 461, 176 A.2d 747, 750 (1961), and note 183 supra.
\textsuperscript{202} See pp. 665-66 supra.
\textsuperscript{203} ABA Standards, supra note 7, at 55. See pp. 665-66 supra.
\textsuperscript{204} Id.
\textsuperscript{205} Id.
\textsuperscript{206} This evidence might be discoverable under Brady v. Maryland, 373 U.S. 83 (1963). See notes 23 and 24 supra.
The most significant addition to evidence discoverable under revised Rule 16(a) is the category of witness lists and witness' statements. In most respects this evidence is the most important to the preparation of the defendant's case, and it is this evidence which is expressly excluded from pretrial disclosure under Rule 16(b). The Jencks Act is totally inadequate as a discovery device for the defendant. Disclosure occurs under it only after the trial has begun and it is extremely difficult for the defense attorney to fully utilize the information at this late stage in the proceedings.

The proposed Rule requires that the prosecutor supply defense counsel with a "brief but revealing transcription" of witnesses' statements which are within the possession of the government. This transcription may be a verbatim statement or a compilation of notes taken by the police or prosecutor during an interview with the witness. The purpose the statement is to serve is merely to inform the defendant of the existence of the witness and the extent of the witness' knowledge of the case. This is necessary for defense counsel to effectively utilize the deposition procedure of proposed subsection (h) for in depth discovery of the witness, if defense counsel decides it necessary to do so.

Subsection (a) of the proposed Rule incorporates the requirement of the Brady decision and extends beyond. The Supreme Court in Brady never clearly defined what type of evidence the prosecution has a positive duty to disclose referring only to "favorable" evidence. As noted above, "favorable" evidence can range anywhere from clearly exculpatory information to very damaging items. A key witness' inability to describe the perpetrator of the crime may not be considered exculpatory evidence by the prosecution; however, this information would certainly aid the defendant in preparing his case. Disclosure of this type of "evidence" is required under the proposed subsection.

The proposed revision of Rule 16(c) reforms the present section (c) in two major aspects: discovery by the defendant under sections (a) and (b) may not be conditioned upon his compliance with Rule 16(c) (discovery by the government); and the defendant may be required to provide the Government with a list of prospective witnesses. The first change

207. This proposed revision is directly contra the Jencks Act, 18 U.S.C. § 3500 (1964), and therefore it may not be implemented by the federal courts absent Congressional repeal of this act. See Hill, supra note 3, § 11.02[3][b]; Rezneck, supra note 3, § 10.02[3][a]; Gregory v. United States, 369 F.2d 185, 188 (D.C. Cir. 1966). Usually defense discovery is conditioned on defendant's willingness under Rule 16(c) to disclose a similar list of witnesses. See, e.g., Rezneck, supra note 3, § 10.02[6], for discussion of reciprocal discovery under Rule 16(c) and constitutional objections to it.

208. In the federal courts, there appears to be an absolute bar to discovery of statements made by government witnesses. See note 14 and accompanying text supra.

209. See ABA Standards, supra note 7, at 56, where it is noted that the right to advance notice of witnesses against the defendant and their prior statements might come under the ambit of the sixth amendment and due process. Palermo v. United States, 360 U.S. 343, 362-66 (1959) (concurring opinion).

deals with reciprocity and its contingent constitutional problems.\(^{211}\) In effect the Government is prevented from using Rule 16(c) as a device which requires the defendant to "pay" for his discovery by waiving his constitutional rights and it requires the Government to utilize Rule 16(g) to compel compliance. Discovery by the Government remains discretionary with the court to further implement the policy that defendant should not be forced to disclose incriminating evidence in order to be able to discover items under Rule 16(a) and (b). The second revision in Rule 16(c) adopts a procedure practiced in certain states\(^{212}\) — exchange of witness lists between the prosecution and defense. An implementation of this procedure would facilitate a speedy and just disposition of the case. The procedure raises basic constitutional issues, however, regarding the defendant's right to remain silent. It is submitted that this right against self-incrimination, in practice, is not absolute. The privilege protects only testimonial utterances and, as noted above, the Government may utilize the accused's body as a valuable source of information against him.\(^{213}\) It would seem that to require the accused to provide his witness list for the Government is less abrasive to his constitutional rights than the use of his body to provide incriminating evidence. In essence, the defendant is not being asked to provide evidence against himself but to eliminate surprise from the trial and aid in a complete investigation of the case which can only result in a just disposition.

Proposed Rule 16 divides evidence into two groups: (1) the evidence enumerated in 16(a), (b) and (c), and (2) the three categories enumerated in 16(e). As to the first group of evidence, 16(e) has the effect of delaying the operation of the court's discretion until a party has come forward and shown cause why discovery should be denied. Read in conjunction with 16(a) and (b), which mandate discovery of certain items subject to the operation of subsection (e) protective order, a strong presumption in favor of discovery arises requiring a substantial showing to defeat disclosure. Therefore, unrestricted operation of the court's discretion at the initial request is avoided. As to the second category of evidence, those items enumerated in 16(e), a presumption against discovery arises greatly lessening the burden of showing cause for denial of discovery by the party opposing discovery. Given the conservatism the federal courts have

\(^{211}\) See Katz, Pretrial Discovery in Criminal Cases: The Concept of Mutuality and the Need for Reform, 5 CRIM. L. BULL. 441 (1969).

It has been held in some state courts that a defendant may be required to make pretrial disclosure of evidence which he intends for use at trial without violating the constitutional privilege against self-incrimination. In Jones v. Superior Court of Nevada County, 58 Cal. 2d 56, 22 Cal. Rptr. 879, 372 P.2d 919 (1962), the court indicated that mandatory pretrial disclosure applied only to items which defendant intends for use at trial eliminates the elements of incrimination and involuntariness of the privilege against self-incrimination. A recent proposal for resolving this dilemma would grant an independent right of discovery to the Government and the defendant. See Judicial Conference, supra note 57, at 39, 57.

\(^{212}\) See Fla. R. Crim. P. 1.220(e) (1968); N.J.R. § 3:13-3(c) (1) & (d) (2) (1969); Hill, supra note 3, at § 11.02[3][b].

\(^{213}\) See p. 621 supra.
exhibited in interpreting present Rule 16, it would seem that in practice, proposed Rule 16(e) would provide adequate protection against abuse by the defense.

By far the most significant proposed revision in Rule 16 is proposed section (h) — a criminal deposition proceeding.\(^{214}\) As noted above,\(^{215}\) it has been suggested by commentators that an expansion of our preliminary examination as an effective discovery device modeled on its British counterpart could provide a vehicle for implementing the criminal discovery process.\(^{216}\) But such an expansion appears impractical and is not responsive to the total needs of the criminal justice system.\(^{217}\)

However, the British experience in this area is valuable in that it is indicative of the fact that broad criminal discovery and effective law enforcement are not mutually exclusive.\(^{218}\) Witness discovery is a key element in effective criminal discovery and the experience in certain of our states has indicated that a system which incorporates this practice is not unworkable. Therefore, what is needed to effectively reform pretrial criminal discovery is a convenient, extra-judicial means of witness confrontation. The deposition procedure is familiar to attorneys, and its successful application in civil proceedings at least warrants a close examination of its use as a criminal discovery device.\(^{219}\) The deposition is less cumbersome than a full-fledged hearing, can be administered without the direct supervision of the court, and provides the defendant with the opportunity to confront government witnesses at the pretrial stage with all the advantages that such confrontations can provide.

Proposed Rule 16(h) makes the granting of a deposition order within the discretion of the court, although the defendant need not show any more than that the deponent's testimony may aid him in the preparation of his case. The broad discovery afforded the defendant under proposed Rule 16(a) and (b) will permit the defense attorney to make a cogent argument for allowing a deposition if required to do so. It should also be noted that 16(h) is subject to the proposed protective order which operates as a safeguard against any abuse which might occur.\(^{220}\)

\(^{214}\) This is not a new suggestion. See Goldstein, supra note 90, at 1193; Weinberg & Weinberg, supra note 159, at 1400-02.

\(^{215}\) See pp. 674-75 supra.

\(^{216}\) It has been urged that:

- it is time that testimonial discovery in criminal cases was extended on a more rational basis. Liberalization of the rules governing the availability of grand jury minutes, Jencks Act statements, and other written material will not provide an effective substitute for preliminary hearing discovery. All of them lack the advantage of direct confrontation and of having witnesses under oath and subject to cross examination. In our view, only the adoption of deposition procedures, . . . would afford adequate and consistent discovery in criminal cases.

Weinberg & Weinberg, supra note 159, at 1400-01 (footnotes omitted).

\(^{217}\) See pp. 677-78 supra.

\(^{218}\) See Brennan, supra note 5, at 293.

\(^{219}\) See Weinberg & Weinberg, supra note 159, at 1401.

VI. Conclusion

This Comment has dealt with only one phase of the criminal justice system and the myriad of obstacles raised in the discussion of the policy considerations on either side of the issue is testimony to the difficult task that lies ahead in the administration of criminal justice. The dilemma of criminal discovery is real and viable solutions to its many complex problems are not easily drafted. One thing is clear — the system can no longer pay lip service to the principle that criminal justice must be a search for truth.

It should also be apparent that while criminal and civil actions share the same adversary setting, there are problems unique to the criminal case\(^{221}\) which prevent wholesale adoption of the federal civil discovery rules as a solution to the issue of reforming criminal discovery. Whatever discovery scheme is adopted must be sensitive to these unique problems and deal with them directly. Perhaps the initial step is a refocusing of the goal of the criminal justice system from a conviction oriented adversary proceeding to a justice oriented proceeding based on cooperation and trust to solve a problem common to all of society.

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221. The most notable ones are the defendant's right against self-incrimination; the necessity of safeguarding the welfare of prospective state's witnesses; and, the fact that in criminal litigation the parties are rarely evenly matched.