Pretrial Discovery and Inspection - New Criminal Rules for Pennsylvania

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Comments

PRETRIAL DISCOVERY AND INSPECTION — NEW CRIMINAL RULES FOR PENNSYLVANIA

I. INTRODUCTION

On June 29, 1977, Chief Justice Eagen of the Pennsylvania Supreme Court signed an order which repromulgated certain rules of criminal procedure in the commonwealth, among which was a rule establishing new procedures for pretrial discovery and inspection. The new discovery rule, rule 305, effective January 1, 1978, greatly liberalizes pretrial inspections in criminal cases and, in so doing, represents a substantial change in the philosophical approach toward the criminal justice system. This article will first discuss the changes made in the rule and compare the commonwealth's new rule 305 to its federal counterpart, rule 16 of the Federal Rules of Criminal Procedure. A comparison of the new rule with its civil counterparts at both the state and federal levels will follow. The article will conclude with an attempt to project the impact the changes will have on the criminal justice system in Pennsylvania.

II. THE OLD RULE vs THE NEW RULE

A. The Old Rule

Rule 310 (old rule) of the Pennsylvania Rules of Criminal Procedure reads as follows:

All applications of a defendant for pretrial discovery and inspection shall be made not less than five days prior to the scheduled date of trial. The court may order the attorney for the Commonwealth to permit the defendant or his attorney, and such persons as are necessary to assist him, to inspect and copy or photograph any written confessions and written statements made by the defendant. No other discovery or inspection shall be ordered except upon proof by the defendant, after hearing, of exceptional circumstances and compelling reasons. The order shall specify the time, place and manner of making discovery or inspection and may prescribe such terms and conditions as are necessary and proper. In no event, however, shall the court order

pretrial discovery or inspection of written statements of witnesses in the possession of the Commonwealth.  

Basically, the old rule did not mandate production of any evidence on the part of either prosecutor or defendant. If application was made to the court for such discovery, it was within the court’s discretion to order compliance with the request or to deny it. Even if production were compelled, defendant was entitled to nothing more than his own written statements or written confessions. The courts were often faced with the question of whether defendant had the right to obtain statements made by him but embodied in a report written by someone else — a report neither signed nor officially adopted by him.

Whether or not more could be compelled hinged on the terms that conditioned an exception — “exceptional circumstances and compelling

6. Id. The comment which followed rule 310 read: Pennsylvania has no statutory provisions dealing with pretrial discovery and inspection in criminal cases. The extensive use of pretrial discovery in civil cases could not be extended to criminal cases. The rule therefore permits the discretionary grant of discovery to the defendant in the narrow area of the defendant’s own confession or written statements.


In Caplan, the Supreme Court of Pennsylvania was concerned about the scope of pretrial discovery in criminal cases. 411 Pa. 563, 568, 192 A.2d 894, 896 (1963). Then Chief Justice Bell said,

[The] questions herein raised are so very important, and because of recent decisions of the Supreme Court of the United States are so frequently presented in criminal cases, and yet the law in this field is so uncertain, that they should be speedily raised and speedily decided by an appellate Court.

Id.

The court dismissed the prosecutor’s petition for a writ of mandamus but stayed the criminal proceedings in the lower court to allow the prosecutor to file a petition for a writ of prohibition to prevent the lower court from enforcing its grant of approval of defendant’s petition for pretrial discovery. Id. at 569, 192 A.2d at 897. The judicial rule arising out of Caplan — that very limited pretrial discovery be allowed in criminal cases — was codified as rule 310.

7. The use of the word “may” signals a discretionary duty rather than a mandatory one.


9. The question arose in Commonwealth v. Barnes, 463 Pa. 259, 344 A.2d 821 (1975). The Supreme Court of Pennsylvania had to decide whether the court should hear an interlocutory appeal from an order of a lower court compelling the prosecutor to produce a criminal defendant’s taped confession and police notes made during the interrogation of the defendant. Id. at 260, 344 A.2d at 822 (Pomeroy, J., dissenting). In a per curiam opinion, the court dismissed the interlocutory appeal as having been improvidently granted. Id. at 260, 344 A.2d at 822. Justice Pomeroy, in a dissenting opinion, argued that the appeal should have been heard and decided on the merits. Id. at 261, 344 A.2d at 822 (Pomeroy, J., dissenting). He would have affirmed the lower court’s order to produce the tape recording because, “[l]ike a writing, recordings are in permanent form and indubitably pertain to the defendant.” Id. at 263, 344 A.2d at 823 (Pomeroy, J., dissenting). As to production of the policeman’s notes, Justice Pomeroy...
would have reversed because he reasoned that "[s]uch notes [were] not the defendant's statements but the police officer's recollection of what the defendant said." *Id.* (footnote omitted).

Six months prior to Barnes, the Supreme Court of Pennsylvania had confronted the question of whether or not the production of defendant's oral statements embodied in an investigative officer's notes could be compelled under rule 310. Commonwealth v. Crawford, 461 Pa. 260, 336 A.2d 275 (1975). Justice O'Brien agreed that the lower court was correct in holding that these notes were not written statements as contemplated by rule 310. *Id.* at 264-65, 336 A.2d at 277. See also Commonwealth v. Turra, 442 Pa. 192, 275 A.2d 96 (1971) (evidence of oral admissions not producible absent a showing of exceptional circumstances and compelling reasons).


12. Some of the reasons rejected by the court as not falling within this condition were: 1) that names of witnesses were needed for purposes of voir dire to insure the impartiality of the jury, Commonwealth v. Brown, 462 Pa. 578, 587-88 n.7, 342 A.2d 84, 89 n.7 (1975); 2) that a summary of police action was needed to inform defense counsel about a lineup in which defendant participated and by which defendant was identified, *id.*; 3) that defendant was out of state contesting extradition which delayed his getting into the defense of his Pennsylvania prosecution, Commonwealth v. Martin, 465 Pa. 134, 164 n.17, 348 A.2d 391, 406 n.17 (1975), *cert. denied*, 428 U.S. 923 (1976); 4) that defendant suffered from an "untutored and impeachable condition in life," *id.;* and 5) that medical records of rape victims were needed because such "records are of a technical nature and expert advice 'might be needed'," *Commonwealth ex rel.* Specter v. Shiomos, 457 Pa. 104, 110, 320 A.2d 134, 137 (1974).
essential to a fair trial. In Commonwealth v. Pritchett, the court held that the name of a government informant was essential to a fair trial and should have been disclosed to the defendant as part of pretrial discovery. The court affirmed the dismissal of the case because of the commonwealth's refusal to disclose the name. Although the Pritchett definition indicated that information and materials which were necessary and essential to a fair trial would always meet the conditions of rule 310, query whether "necessary and essential to a fair trial" is any less ambiguous and any less subject to arbitrary application than "exceptional circumstances and compelling reasons." 

The pre-1978 criminal defendant, then, was statutorily entitled to very little information by means of pretrial discovery, and that entitlement was not absolute but was subject to the discretion of the court. Not only was he limited in what he could affirmatively request, but the courts were specifically forbidden to permit him to discover statements of witnesses.


[A] motion judge's conclusion that disclosure of an informant's identity is necessary and essential to a fair trial is tantamount to a finding that there are "exceptional circumstances and compelling reasons" within Rule 310. Such an exception to a rule generally prohibiting discovery is required where disclosure is based upon considerations of fairness that have constitutional dimensions.

Id. at 410, 312 A.2d at 439.

The Supreme Court of Pennsylvania had held, however, that the denial of pretrial discovery, absent satisfaction of the conditions of rule 310, was not a deprivation of due process under the fourteenth amendment. Commonwealth v. Scott, 489 Pa. 258, 265, 365 A.2d 140, 143 (1976); Commonwealth v. Turra, 442 Pa. 192, 196, 275 A.2d 96, 97-98 (1971).


15. Id. at 409-11, 312 A.2d at 439-40. For a general discussion of the problems concerning the disclosure of identity of informants, see Ranney, supra note 4, at 6-8.


18. See note 7 supra.

19. Pa. R. Crim. P. 310, PA. STAT. ANN., Rules of Crim. P. (Purdon Pamphlet 1977) (current version at PA. R. Crim. P. 305). This refusal to allow defendant access to witnesses' statements was applicable only before trial. In Commonwealth v. Kontos, 442 Pa. 343, 276 A.2d 830 (1971), the supreme court held that witnesses' statements should be given to defense counsel after the witnesses had testified at trial. Id. at 347-51, 276 A.2d at 832-34. Justice Jones concluded that traditional rationales for limiting or prohibiting pretrial discovery in criminal cases [did] not extend to the at-trial situation. ... Once the Commonwealth's witnesses have appeared at trial, their personal safety and freedom from potential intimidation are in no way enhanced by denying to the defendant access to their pretrial statements. Nor would the granting of such access to the defendant heighten his opportunity for successful perjury.

Id. at 349, 276 A.2d at 833.

Following Kontos, it was believed by most prosecutors that only those parts of witnesses' prior statements which related to their direct testimony had to be produced
There are a number of indications from the bench that the judiciary was unhappy with this restrictive and sometimes ambiguous pretrial discovery rule. This dissatisfaction, among other things, was the impetus for bringing about the new rule.

at trial. This rationale was predicated on the following dictum in Commonwealth v. Swierczewski, 215 Pa. Super. Ct. 130, 257 A.2d 336 (1969): “[D]efense access [to prior statements of Commonwealth witnesses] is subject to the control of the trial court, which must review the requested documents and may permit access only to those portions relevant to matters raised in direct examination.” Id. at 135, 257 A.2d at 339 (dictum).

This rationale was challenged and defeated in Commonwealth v. Hamm, ___ Pa. ___., 378 A.2d 1219 (1977). In the Hamm case, the prosecution had withheld two witnesses’ statements. Id. at ____, 378 A.2d at 1224. The trial judge reviewed the complete statement, agreed with the prosecutor that the omitted statements were not relevant to the direct testimony, and denied defense counsel access to them. Id. at ____, 378 A.2d at 1224. The supreme court held on appeal that the complete statements of the witness must be turned over, not to the judge, but to defense counsel in the first instance. Id. at ____, 378 A.2d at 1226. Only the defense counsel, said the court, can determine whether the information in the statement is helpful. Id. at ____, 378 A.2d at 1225. In Hamm, the court remanded to the trial court to determine whether the withholding of the parts of the two statements was harmless error. Id. at ____, 378 A.2d at 1227.

20. In Commonwealth ex rel. Specter v. Shiomos, 457 Pa. 104, 320 A.2d 134 (1974), several members of the court expressed opinions that the rules for pretrial discovery in criminal cases should be liberalized. Justice Eagen advocated change by amendment, saying:

There is no question good arguments can be made for the proposition that the pre-trial discovery rules should be liberalized. The fact is, however, Rule 310 is the rule of criminal procedure in this Commonwealth and it must be followed by the trial courts as long as it is the rule in force. If the criminal procedure rules are to be liberalized, this should be done in the proper manner, namely, by amendment. If the rules are liberalized on a case by case basis by this Court, or by individual interpretation by lower court judges, the inevitable result would be judicial inconsistency and confusion. The undesirability and unfairness of this result is self-evident. Id. at 110, 320 A.2d at 137.

Justice Pomeroy recommended a study of the federal rule governing pretrial disclosure in criminal cases:

While the trend of recent writing appears to have been in favor of increasing the range of permissible discovery, it must be acknowledged that “the extent to which pre-trial discovery should be permitted in criminal cases is a complex and controversial issue.” Note of Advisory Committee on 1966 Amendments to Rule 16 of the Federal Rules of Criminal Procedure, 39 F.R.D. 175 (1966). Without here engaging in extended discussion of the subject, I, for one, see merit in a rule which would permit inspection by a defendant of records or reports of physical or mental examinations in the possession of the government made in connection with a particular case, and which are relevant. This is in line with the amended Federal Rule 16(a), which indeed would bear study in its entirety in connection with any revision of our own rule. Id. at 111, 320 A.2d at 137-38 (Pomeroy, J., concurring) (footnote omitted).

Justice Nix agreed with the other two justices by emphasizing “the need to liberalize [the] rules of pre-trial discovery in criminal cases” and by commending “the trial courts’ action [in] highlighting that need.” Id. at 112, 320 A.2d at 138 (Nix, J., concurring).

See also Commonwealth v. Mervin, 230 Pa. Super. Ct. 552, 326 A.2d 602 (1974), in which the superior court acknowledged that the supreme court was in favor of liberalizing the discovery rules. Id. at 558, 326 A.2d at 605. In Mervin, the court affirmed the trial court’s conviction for subornation of perjury and conspiracy after finding that the lower court’s denial of pretrial discovery to the defendant was
B. The New Rule

1. Informal

The new rule, rule 305, is divided into seven parts which will be discussed separately. Section A of the rule calls for both prosecutor and defense counsel to make good faith efforts to seek and to achieve discovery on an informal basis before asking assistance of the court:21

Before any disclosure or discovery can be sought under these rules by either party, counsel for the parties shall make a good faith effort to resolve all questions of discovery, and to provide information required or requested under these rules as to which there is no dispute. When there are items requested by one party which the other party has refused to disclose, the demanding party may make appropriate motion to the court. Such motion shall be made within fourteen (14) days after arraignment, unless the time for filing is extended by the court. In such motion the party must set forth the fact that a good faith effort to discuss the requested material has taken place and proved unsuccessful. Nothing in this provision shall delay the disclosure of any items agreed upon by the parties pending resolution of any motion for discovery.22

No conditions are placed on the authority of the court to extend the time for filing. Whether it would be granted automatically on motion of one of the parties or on the court's own motion, or whether the court would require a showing of reasonable conditions is not clear.

2. Disclosure by the Commonwealth

Section B(1) of rule 305 describes what the prosecutor must turn over to the defense counsel:23

(1) MANDATORY: In all court cases, on request by the defendant, and subject to any protective order which the Commonwealth might obtain under this rule, the Commonwealth shall disclose to the defendant's attorney all of the following requested items or information, provided they are material to the instant case. The Commonwealth shall, when applicable, permit the defendant's attorney to inspect and copy or photograph such items.24

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22. Id. The arraignment which triggers the fourteen-day filing period is the formal arraignment, or a substitute proceeding in some judicial districts. It is not the preliminary arraignment which must be held within six hours of defendant's arrest. The six-hour rule was propounded in Commonwealth v. Davenport, ___ Pa. ___, 370 A.2d 301 (1977). The timing and manner of conducting these formal arraignments which follow a preliminary hearing and precede trial are found in rule 303 of the Pennsylvania Rules of Criminal Procedure. Pa. R. Crim. P. 303 (amending Pa. R. Crim. P. 317, Pa. Stat. Ann., Rules of Crim. P. (Purdon Pamphlet 1977)).
24. Id.
Although this section is captioned MANDATORY, production of all the items subsequently enumerated is subject to any protective order which the prosecutor may obtain. Protective orders are discussed in the portion of this comment dealing with section F of the new rule, but it should be noted that compelled production of certain information by the commonwealth fails to be the certainty that some prosecutors and defense attorneys initially believed it would. On the other hand, there is no doubt that the supreme court did intend the rule to be mandatory except under special circumstances. Not only does the caption so read, but the verb used in the section is "shall disclose" rather than the discretionary "may disclose."26

There are specific conditions which defense counsel must meet, however, in order to be entitled to receive certain materials. Initially, he must request them.27 There is no affirmative duty on the prosecutor to turn over anything unsolicited other than material mandated by the Supreme Court case, Brady v. Maryland,28 that is, material in the possession and control of the prosecutor that may be favorable to the defendant.29 Secondly, the requested items must be material to the instant case.30 When there is a dispute as to materiality, the court may ask that the items in dispute be delivered to them for an in camera inspection to determine whether or not the items are material.31

Section B(1)(a) is a restatement of the Brady doctrine.32 It requires that the commonwealth produce "[a]ny evidence favorable to the accused which

25. See notes 122–25 and accompanying text infra.
27. Id.
28. 373 U.S. 83 (1963). In Brady, the Supreme Court held that the withholding of an exculpatory statement which was made by defendant's alleged coconspirator and was in the possession of the prosecutor, was a denial of due process under the fourteenth amendment. Id. at 86–87. There remained after Brady the question of whether or not there was an affirmative duty on the part of the prosecution to disclose exculpatory material or whether, to use Justice Douglas's words, the violation occurred when there was "suppression by the prosecution . . . upon [accused's] request . . . ." Id. at 87 (emphasis added).

The Supreme Court itself acknowledged that this was still an unanswered question in United States v. Agurs, 427 U.S. 97 (1976). Justice Stevens, in delivering the opinion of the Court, said, "[T]his Court has not yet decided whether the prosecutor has any obligation to provide defense counsel with exculpatory information when no request has been made." Id. at 106. Later, in discussing the nature of particular items of evidence, he added, "[I]f the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made." Id. at 107. Therefore, absent a request, the prosecutor still has a duty to turn over material or information that would create a reasonable doubt as to defendant's guilt, a doubt that would not exist absent the material. Id. at 112–13. In Agurs, the Court found that the failure of the prosecutor to turn over to defense counsel the victim's arrest record did not deprive the defendant of a fair trial. Id. at 114.

See also Commonwealth v. Royster, ___ Pa. ___, 372 A.2d 1194 (1977) (holding that neither Brady nor rule 310 required disclosure of the complete police investigative file); Ranney, supra note 4, at 10–12.
31. Id. 305F. The courts may use such an in camera proceeding to settle any disputes over discoverability.
32. See note 28 supra.
is material either to guilt or to punishment, and which is within the possession or control of the attorney for the Commonwealth." 33 A prosecutor, however, could not rely upon rule 305 to withhold such material because it was not requested or because it was subject to a protective order. 34 Withholding of such material has been held by the Supreme Court of the United States to be a denial of due process under the United States Constitution, 35 and such a rule of constitutional law supersedes any procedural rule promulgated by a state court. 36

Subsection B(1)(b) mandates the production of "any written confession or inculpatory statement or the substance of any oral confession or inculpatory statement, and the identity of the person to whom the confession or inculpatory statement was made, which is in the possession or control of the attorney for the Commonwealth." 37 This provision raises the interesting question of what is meant by "the substance of any oral confession or inculpatory statement." 38 Could this mean any such statement embodied in a policeman's notes or a district attorney's report? 39 Does it include witnesses' statements if the defendant made inculpatory remarks to them? The scope of this clause will ultimately have to be determined by the courts.

The next four subsections appear to be relatively straightforward as to what disclosure is required of the commonwealth:

(c) the defendant's prior criminal record;

(d) the circumstances and results of any identification of the defendant by voice, photograph, or in-person identification;

(e) results or reports of scientific tests, expert opinions, and written or recorded reports of polygraph examinations or other physical or mental examinations of the defendant, which are within the possession or control of the attorney for the Commonwealth;

33. PA. R. CRIM. P. 305B(1)(a).
34. In the comments following rule 305 is the following statement:
   It should also be noted that as to material which is discretionary with the court, or which is not enumerated in the rule, if such information contains exculpatory evidence as would come under the Brady rule, it must be disclosed. Nothing in this rule is intended to limit in any way disclosure of evidence constitutionally required to be disclosed.
PA. R. CRIM. P. 305, Comment.
36. U.S. Const. amend. XIV. The amendment provides in part: "No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property without due process of law." Id. Therefore, if a state official acting under color of law suppresses exculpatory material, he is in violation of the amendment. Brady v. Maryland, 373 U.S. 83, 86-88 (1963). No state procedural rule can divest a defendant of his constitutional rights which were recognized under Brady.
37. PA. R. CRIM. P. 305B(1)(b).
38. Id.
39. See note 9 and accompanying text supra. There does not seem to be a bar in the rule itself which would preclude such production. Even though an attorney's reports might be subject to the work product immunity, see notes 126-34 and accompanying text infra, the immunity is partial and would not cover the substance of defendant's statements embodied in such a report. PA. R. CRIM. P. 305G.
(f) any tangible objects, including documents, photographs, fingerprints, or other tangible evidence.  

Subsections (1)(a), (b), and (e) all refer to production of things that are in the possession or control of the attorney for the commonwealth. Over whom and over what does the state prosecutor have control? In Commonwealth v. Smith, defense counsel requested that the trial court issue a subpoena duces tecum compelling the Federal Bureau of Investigation to turn over statements which two prosecution witnesses had made to federal agents. The trial court refused the request after being informed by a representative of the F.B.I. that the Bureau would not produce the reports. On appeal from conviction, the supreme court noted that "it was the F.B.I. and not the Commonwealth which denied [defendant] access to the information in question." The court stated, "The Commonwealth is no more to blame for the unavailability of the F.B.I. reports than if a witness beyond the reach of process refused to voluntarily appear and testify on behalf of [defendant]." In addition, the court agreed with the state prosecutor that the substance of the statements made to the federal agents was available to the defendant through statements made to the state prosecutor by the same witnesses. The United States Supreme Court granted certiorari, and the Smith case was remanded by it to the state supreme court for reconsideration. On remand, the court held that the sixth and fourteenth amendments to the federal Constitution required that the defendant be granted access to the statements.

Does the inclusion of the limiting factor in subsections B(1)(a), (b), and (e) mean that there is some duty imposed on the prosecutor under the other subsections to produce items or information which are not within his

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41. Id. 305B(1)(a), (b), (e).
43. 412 Pa. at 2-3, 192 A.2d at 671.
44. Id. at 3, 192 A.2d at 672.
45. Id. at 4, 192 A.2d at 672.
46. Id. at 4, 192 A.2d at 672.
47. Id. at 4, 192 A.2d at 672-73.
49. Id. at 329, 208 A.2d at 223. Justice Musmanno concluded: Smith had the right to, and great need for, the statements he requested. The 6th Amendment to the Constitution of the United States guarantees to the accused the right "to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense." While this Amendment is directed to federal criminal prosecutions, the Supreme Court of the United States held in Gideon v. Wainwright, 372 U.S. 335, that that part of the 6th Amendment requiring assistance of counsel is binding on the States. Since the process sought to be here invoked had to do with documents in possession of the Federal government, the 6th Amendment would apply, and a refusal to comply with the mandate would amount to denial of due process guaranteed under the 14th Amendment.
40. Id. (footnote omitted).
control, or is the question mooted because of the Smith holding, especially if
the party in control of the material sought to be produced is some agency of
the federal government? 50

Subsection B(1)(g) mandates the disclosure of "the transcripts and
recordings of any electronic surveillance, and the authority by which the
said transcripts and recordings were obtained." 51 In Pennsylvania, the
nonconsensual use of such electronic surveillance is a misdemeanor of the
second degree. 52 There is a narrowly drawn exception for state and local law
enforcement officers in situations in which their personal safety is in
jeopardy: 53 they must be on duty; they also must first obtain court approval;
and recordation is prohibited. 54 Given that there can be no lawful

50. Smith seems to indicate that this latter interpretation might be the case. Id. at
331–32, 208 A.2d at 224–25. The court directed itself to the federal-state problem when
it said:
If the case at bar were being tried in a federal court, there can be no question that
the FBI statements here under focal attention would be supplied to the defendant
and they would be used at the trial. Nor can there be any surmise that if the
Sweet and Corcoran statements had been collected by the Pennsylvania State
Police, this Court would order the State Police to surrender the statements to the
defendant for his trial in the State court. With this irrefutable premise, it can
only be a paradox beyond compare to say that, because this case adds up the
guarantees of both Federal and State governments, that the total is less than the
individual parts; that while Smith would be allowed federal documents in a
federal court and state documents in a state court, he cannot, with both the
Federal and State governments looking on, obtain a federal document to use in a
state court, where his basic constitutional rights, both Federal and State, are
involved. The law sometimes take [sic] illogical turns, but this Court could not
permit anything so illogical and so fundamentally unfair to take lodgment in the
State Reports of this Commonwealth.
Id. at 332, 208 A.2d at 225.
One could hypothesize a situation in which there were concurrent criminal
investigations being pursued by the respective state and federal law enforcement
agencies. If a state defendant requested what he alleged to be material information
under rule 305B(1), but which information was under the control of the federal
investigators, would the state courts impose a requirement upon the state prosecutor
to produce the item or be subject to sanctions? Although this interpretation seems
harsh, a literal reading of the rule can produce just such a conclusion. Given the
Smith case, perhaps the problem of "who has control" is irrelevant, and concepts of
proper federalism restraints should yield to a doctrine fashioned to protect an
individual's constitutional rights. See also Commonwealth v. Friday, 171 Pa. Super.
Ct. 397, 406–07, 90 A.2d 856, 859–60 (1952) (state police records not deemed to be in
custody or control of district attorney).
53. Id. § 5705(c)(3). The relevant section reads:
Duly appointed public Pennsylvania State and local law enforcement
officers in the performance of their law enforcement duties when acting pursuant
to an order of court issued in accordance with the provisions of subsection (d) of
this section. This exception shall be limited to those situations in which the
personal safety of such law enforcement officers is in jeopardy and shall not
include any right of recordation. The electronic recording of any conversation
overheard by electronic or mechanical means or other device in the exercise of
this exception shall not be admissible in any judicial or administrative
proceeding.
Id.
54. Id.
transcripts and recordings of electronic surveillance in Pennsylvania, is the requirement that the commonwealth be compelled to produce such unlawful material therefore violative of the recorder's fifth amendment right not to be compelled to be a witness against himself in any criminal case? This section, too, awaits judicial clarification.

Following the list of items that the prosecution must turn over to defense counsel is a list of other items that the court may or may not order to be produced.

(2) DISCRETIONARY WITH THE COURT: In all court cases, if the defendant files a motion for pretrial discovery, the court may order the Commonwealth to allow the defendant's attorney to inspect and copy or photograph any of the following requested items, upon a showing that they are material to the preparation of the defense, and that the request is reasonable:

(a) the names and addresses of eyewitnesses;

(b) all written or recorded statements, and substantially verbatim oral statements, of eyewitnesses the Commonwealth intends to call at trial;

(c) all written or recorded statements, and substantially verbatim oral statements, made by co-defendants, and by co-conspirators or accomplices, whether such individuals have been charged or not;

55. See U.S. CONST. amend. V.

56. Although section B(2) confers discretionary power on the trial judge to compel the production of certain materials, Chief Justice Jones in DiJoseph Petition, 394 Pa. 19, 145 A.2d 187 (1958), indicated that, under the old rule 310, discretion already was lodged in the trial judge to permit defendant to examine certain evidence under appropriate circumstances. Id. at 22, 145 A.2d at 188. (Jones, C. J., concurring). He said, "[A] trial court having jurisdiction of an alleged offender possesses discretionary power to permit a defendant, in appropriate circumstances, to examine and inspect in advance of trial physical or documentary evidence in the hands of the prosecution." Id.

In State v. Haas, 188 Md. 63, 51 A.2d 647 (1947), Chief Justice Marbury of the Maryland Supreme Court spoke of the protective aspects of leaving certain questions of pretrial discovery to the discretion of the trial judge:

There can be no doubt that the recognition of the right in a trial court to permit the defendant to examine his confession in advance of the trial was not recognized at common law. But law is a growth and a great many matters, commonplace to us now, were not thought of many years ago. . . . [T]he tendency in the courts of this country is to permit discretion in the trial judge. The argument made against any such discretion is based upon a fear that the State, which is charged with the prosecution of crime, may be hampered in its duty by the disclosure of its evidence to those charged with offenses. Whatever merit that argument has as applied to a situation where it is contended that the accused has a right to inspect the evidence, it has no application, we think, to a situation where the trial judge in each case and on each application, determines what should be done in the interest of justice. There are cases in which it would be clearly unjust to deny such an application and, on the other hand, cases are conceivable in which it might improperly hamper the prosecution to grant such an application.

Id. at 75-76, 51 A.2d at 653 (emphasis in original). See also Louisell, Criminal Discovery: Dilemma Real or Apparent?, 49 CALIF. L. REV. 56, 98 (1961).
(d) any other evidence specifically identified by the defendant, provided the defendant can additionally establish that its disclosure would be in the interests of justice.57

Again, the same two conditions attach as those applied to the mandatory provision — that items must be requested and must be material to the instant case.58 One additional condition — that the request be reasonable —59 as well as the use of the discretionary verb helper "may,"60 are the only things that distinguish access to these items from access to the mandatory items. A strict reading of the statute would lead one to assume that a court could deny a motion for discovery under rule 305B(2) even though the request was proper and reasonable and the items were material to the instant case. An alternative reading of the statute, however, is that reasonableness and materiality define the scope of the court's discretion, and that to deny access to information after finding the request to be both reasonable and material would be an abuse of that discretion.

Only names of eyewitnesses need be given, not names of all witnesses.61 Written statements of those eyewinneses the prosecution intends to call at trial are producible as are "substantially verbatim oral statements."62 Just as there will be confusion in determining what is meant by "the substance of any oral confession or inculpatory statement" under subsection B(1)(b),63 so also will there be confusion as to what are "substantially verbatim oral statements" under subsection B(2)(b).64 Are all reports and records which might include such statements discoverable even though they might be classified as work product?65 Similar problems may arise in subsection B(2)(c) which pertains to statements of codefendants, coconspirators, and accomplices.66

57. PA. R. CRIM. P. 305B(2)(a)-(d).
58. Id. 305B(2). See notes 28-31 and accompanying text supra.
59. PA. R. CRIM. P. 305B(2).
60. Id.
61. Id. 305B(2)(b).
62. Id. See note 19 and accompanying text supra.
63. PA. R. CRIM. P. 305B(1)(b). See text accompanying note 37 supra.
64. See PA. R. CRIM. P. 305B(2)(b). In Commonwealth v. Hustler, 243 Pa. Super. Ct. 200, 364 A.2d 940 (1976), defendant, who had been convicted of rape, argued on appeal that he had requested, for impeachment purposes, and had been denied use of an investigator's report which contained a summary of the victim's formal statement. Id. at __, 364 A.2d at 941. The court recognized that the prosecutor had turned over to defense counsel the victim's formal statement and held that the investigative report could not be considered a statement of the witness. Id. at __, 364 A.2d at 941.
65. Even under the old rule 310, see text accompanying note 5 supra, the court was faced with the problem of materials only part of which were subject to discovery. See Commonwealth v. Swierczewski, 215 Pa. Super. Ct. 130, 257 A.2d 336 (1969). In Swierczewski, defendant alleged that the affidavit in support of a search warrant was defective in that there was insufficient information given to justify a finding of probable cause. Id. at 132, 257 A.2d at 337. He was denied access to the police reports which contained the names of informants. Id. at 134, 257 A.2d at 338. Arguing that he only wanted relevant portions of the file and not the names of the informants, he was granted a new trial to allow discovery within those limitations. Id. at 134, 136, 257 A.2d at 338-39.
66. PA. R. CRIM. P. 305B(2)(c).
It is subsection B(2)(d) that prosecutors fear may open the Pandora’s box of the commonwealth’s evidence. A defendant may request “any other evidence” conditioned only on specificity of the request and on proof that disclosure is “in the interests of justice.” By putting the mandatory and discretionary sections together without this last subsection, there seems to be only one major category of information not subject to discovery — the identity of and disclosure from nonexpert, noneyewitness witnesses whose testimony does not fall within Brady material. Can a defendant acquire names and statements of such witnesses through subsection B(2)(d)? The judiciary’s treatment of defense requests under this subsection will reveal whether the clause will be as broadly construed as prosecutors fear.

3. Disclosure by the Defendant

Defendants are likewise under a mandate to disclose certain material:

(a) Notice of Alibi Defense: A defendant who intends to offer the defense of alibi at trial shall, at the time required for filing the omnibus pretrial motion under Rule 306, file of record notice signed by the defendant or the attorney for the defendant, with proof of service upon the attorney for the Commonwealth, specifying intention to claim such defense. Such notice shall contain specific information as to the place or places where the defendant claims to have been at the time of the alleged offense and the names and addresses of witnesses whom the defendant intends to call in support of such claim.

(b) Notice of Insanity or Mental Infirmitiy Defense: A defendant who intends to offer at trial the defense of insanity, or a claim of mental infirmity, shall, at the time required for filing an omnibus pretrial motion under Rule 306, file of record notice signed by the defendant or the attorney for the defendant, with proof of service upon the attorney for the Commonwealth, specifying intention to claim such defense. Such notice shall contain specific available information as to the nature and extent of the alleged insanity or claim of mental infirmity, and the period of time which the defendant allegedly suffered from such insanity or mental infirmity, and the names and addresses of witnesses, expert or otherwise, whom the defendant intends to call at trial to establish such defense.

The notice of alibi defense has been a much debated provision in many state and federal codes, and the controversies surrounding such rules

67. Id. 305B(2)(d).
68. See note 28 supra.
69. Two cases held, under old rule 310, that lists of witnesses were not discoverable unless defendant alleged and proved exceptional circumstances and compelling reasons. Commonwealth v. Bederka, 459 Pa. 653, 658, 331 A.2d 181, 183 (1975); Commonwealth v. Ware, 459 Pa. 334, 368–69, 329 A.2d 258, 275–76 (1974). Those criteria were doubtless more stringent than the criteria established in rule 305B(2), that is, materiality, reasonableness, and proof that disclosure would be in the interests of justice. Pa. R. CRIM. P. 305B(2)(d).
70. Pa. R. CRIM. P. 305C(1)(a), (b).
culminated in the Supreme Court's decision in *Wardius v. Oregon.* 71 In *Wardius* the Court held that a defendant could not be compelled to reveal an alibi defense and the names of witnesses unless the statute provided for reciprocity — that is, that the prosecutor would be compelled to disclose the names of witnesses he intended to call to disprove defendant's alibi. 72 The new Pennsylvania rule, unlike its predecessor, 74 complies with *Wardius* in subsection C(1)(c) by providing for reciprocity: 75

(c) Disclosure of Reciprocal Witnesses: Within seven (7) days after service of such notice of alibi defense or of insanity or claim of mental infirmity defense, or within such other time as allowed by the court upon cause shown, the attorney for the Commonwealth shall disclose to the

72. Id. at 472.
73. See id. at 471 & n.2. There are literally volumes written about notice of alibi provisions in criminal procedure rules. Pennsylvania's predecessor to the new rule 305 in this area was rule 312:
 Notice of Alibi Defense
(a) When a defendant intends to offer the defense of alibi at trial, he shall at any time before or after indictment but not later than five days before trial, file notice with proof of service on the attorney for the Commonwealth, specifying his intention to claim such defense and giving the place where he will claim to have been at the time of the alleged offense and the names and addresses of the witnesses he intends to call in support of such claim.
(b) Unless the interests of justice require it, on a defense of alibi a defendant may not call any witness not named in such notice, or any witness on an alibi different from that alleged in the notice.
(c) A defendant may himself testify concerning an alibi notwithstanding he has not filed notice, but if he has filed notice and testifies concerning his presence at the time of the offense at a place different from that specified in his notice, he may be cross-examined concerning such notice.
(d) No adverse inference may be drawn against a defendant, nor may any comment be made concerning his failure to call available alibi witnesses, where such witnesses have been prevented from testifying by reason of this rule, unless the defendant or his counsel shall attempt to explain such failure to the jury.


In Commonwealth v. Jackson, 457 Pa. 79, 319 A.2d 161 (1974), defendant had been convicted of armed robbery in a trial in which he had complied with the notice of alibi provision, but the Commonwealth had failed to reciprocate. Id. at 80-81, 319 A.2d at 162. On appeal, the Supreme Court of Pennsylvania reversed and granted a new trial, holding that the Commonwealth had a constitutional duty under *Wardius* to reciprocate and disclose any witnesses whose testimony would tend to refute defendant's alibi. Id. at 82, 319 A.2d at 163. Justice Eagen dissented, arguing that the prosecution had no rebuttal witnesses and therefore none to disclose. Id. at 85, 319 A.2d at 164-65 (Eagen, J., dissenting). The new rule 305 requires the disclosure of witnesses who will disprove and discredit defendant's proffered alibi testimony, Pa. R. Crim. P. 305C(1)(c), but does not specifically cover the Jackson situation in which there are no rebuttal witnesses. See id.

Justice Pomeroy dissented in *Jackson,* arguing that the commonwealth could not be forced to disclose its witnesses and that the only sanction for failure to reciprocate would be to preclude the commonwealth from enforcing the notice of alibi provision against the defendant. 457 Pa. 79, 86-88, 319 A.2d 161, 165-66 (1974) (Pomeroy, J., dissenting).

defendant the names and addresses of all persons the Commonwealth
intends to call as witnesses to disprove or discredit the defendant's
claim of alibi or of insanity or mental infirmity.\textsuperscript{76}

Similarly, the defendant must notify the prosecutor if he expects to plead a
defense of insanity, and the commonwealth's duty to reciprocate is provided
by subsection C(1)(c).\textsuperscript{77}

If the defendant fails to file notice of either alibi defense or insanity
defense, or if the prosecutor fails to reciprocate when a notice is duly filed,
the court has the discretion to omit such evidence, to grant a continuance to
investigate the newly raised matter, or to fashion its own remedy:\textsuperscript{78}

(d) Failure to File Notice: If the defendant fails to file and serve
notice of alibi defense or insanity or mental infirmity defense as
required by this rule, or omits any witness from such notice, the court at
trial may exclude the testimony of any omitted witness, or may exclude
entirely any evidence offered by the defendant for the purpose of
proving the defense, except testimony by the defendant, or may grant a
continuance to enable the Commonwealth to investigate such evidence,
or may make such other order as the interests of justice require.

(e) Failure to Supply Reciprocal Notice: If the attorney for the
Commonwealth fails to file and serve a list of its witnesses as required
by this rule, or omits any witness therefrom, the court at trial may
exclude the testimony of any omitted witness, or may exclude any
evidence offered by the Commonwealth for the purpose of disproving the
alibi, insanity or mental infirmity defense, or may grant a continuance to
enable the defense to investigate such evidence, or may make such
other order as the interests of justice require.\textsuperscript{79}

Because of the fifth and sixth amendment problems, the defendant cannot
be prohibited from raising such defenses himself at trial even though he
failed to give notice:\textsuperscript{80}

(g) Impeachment: A defendant may testify concerning an alibi
notwithstanding that the defendant has not filed notice, but if the
defendant has filed notice and testifies concerning his presence at the

\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} Pa. R. Crim. P. 305C(1)(d), (e).
\textsuperscript{79} Id.
\textsuperscript{80} Pa. R. Crim. P. 305C(1)(g). To disallow defendant the right to testify at trial in
his own defense as a permissible sanction for violation of a rule of criminal procedure
would fly in the face of sixth amendment guarantees of the right to a fair trial and
fifth amendment guarantees of due process. U.S. Const. amends. V, VI.

The American Bar Association indicated that such a provision would be
subject to constitutional limitations. ABA Standards, Discovery and Procedure
Before Trial §3.3 (1970). For a discussion of sixth amendment problems relating to
discovery, see Allis, Limitations on Prosecutorial Discovery of the Defense Case in
Note, The Conundrum of Criminal Discovery: Constitutional Arguments, ABA
time of the offense at a place or time different from that specified in the notice, the defendant may be cross-examined concerning such notice.81

If the defendant does not file notice of the defenses, and if the court refuses to let his witnesses testify, the prosecution cannot argue, in response to defendant's own testimony, that if the defendant were telling the truth, he would have witnesses to back up his story and that the absence of such witnesses gives rise to a strong inference that he is lying:82

(f) Failure to Call Witnesses: No adverse inference may be drawn against the defendant, nor may any comment be made concerning the defendant's failure to call available alibi, insanity or mental infirmity witnesses, when such witnesses have been prevented from testifying by reason of this rule unless the defendant or the defendant's attorney shall attempt to explain such failure to the jury.83

While subsection C(1)(f) prohibits such prosecutorial conduct,84 the prosecution is given no similar protection. If prosecution witnesses, called to refute an alibi or insanity defense, are prevented from testifying because the prosecutor failed to reciprocate under C(1)(c),85 the defense counsel may presumably use that absence of testimony to imply that the prosecutor is unable to refute the defendant's defenses.

Following the mandatory provisions of rule 305C is a section which provides that there are certain items that the court may, in the exercise of discretion, order the defendant to produce:

(2) DISCRETIONARY WITH THE COURT: In all court cases, if the Commonwealth files a motion for pretrial discovery, the court may order the defendant, subject to the defendant's rights against compulsory self-incrimination, to allow the attorney for the Commonwealth to inspect and copy or photograph any of the following requested items, upon a showing of materiality to the preparation of the Commonwealth's case and that the request is reasonable.86

There are three conditions which attach to this discretionary provision. Initially, discovery of the material requested must not violate the defendant's constitutional right not to incriminate himself.87 Therefore, one could assume that only material neutral on its face or favorable to the defendant would be discoverable. An interesting question is whether evidence which is seemingly neutral when defendant is compelled to produce it under this section, but which becomes incriminating evidence as the result of

82. Id. 305C(1)(f).
83. Id.
84. Id.
85. Id. 305C(1)(c). See text accompanying note 76 supra.
86. Pa. R. Crim. P. 305C(2).
87. Id. See U.S. Const. amend. V. See Allis, supra note 80, at 488-99; Louisell, supra note 56, at 87-90; Note, supra note 80, at 810-19.
investigation, could be suppressed at trial.\textsuperscript{88} A related question involves
discovery of neutral evidence which leads, through investigation, to
additional evidence which is in fact incriminating.\textsuperscript{89} Would the evidence in
the latter situation be suppressed as the "fruit of the poisonous tree"?\textsuperscript{90} —
that is, evidence developed from other evidence which the defendant was
forced to give, arguably in violation of his fifth amendment right?\textsuperscript{91} Whether
or not future state criminal defendants will seek suppression of evidence on
these grounds remains to be seen.

Materiality and reasonableness are the other two conditions which must
be met by the prosecutor.\textsuperscript{92} However, fulfilling these two conditions would
not be enough to compel disclosure by the defense of incriminatory
evidence.\textsuperscript{93} It is only when the information sought \emph{is} not incriminatory and
\emph{is} material and reasonable that the court can use its discretionary powers to
permit or prohibit discovery.\textsuperscript{94}

Subsection C(2)(a) at first glance seems to track subsection B(1)(e) which
states that the defendant may get certain test results and reports from the
prosecution.\textsuperscript{95} The following items may be discoverable under subsection
C(2)(a):

\begin{quote}
(a) 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 or control of the defendant,
which the defendant intends to introduce as evidence in chief, or which
were prepared by a witness whom the defendant intends to call at the
trial, when results or reports relate to the testimony of that witness,
provided the defendant has requested and received discovery under
paragraph B(1)(e);\textsuperscript{96}
\end{quote}

In fact, production of such information in the defendant's control will be
denied unless the defendant has requested and obtained such material from
the prosecution.\textsuperscript{97} There is one factor on the face of the rule itself that
distinguishes subsection C(2)(a) from subsection B(1)(e); there are, in
addition, other differences between them. The obvious distinction is that
while the production of such reports is mandatory from prosecutor to
defendant,\textsuperscript{88} it is only discretionary from defendant to prosecutor.\textsuperscript{99} A

\textsuperscript{88} The comments following rule 305 contain the following statement: "This rule
is not intended to affect the admissibility of evidence discoverable under this rule or
the fruits thereof, nor the standing of the defendant to seek suppression of such
evidence." \textit{PA. R. CRIM. P. 305}, Comment.
\textsuperscript{89} \textit{See id.}
\textsuperscript{91} The evidence excluded in \textit{Wong Sun} was developed subsequent to a fourth
amendment violation, \textit{id.} at 484-91, but the analysis would be the same for fifth
amendment purposes.
\textsuperscript{92} \textit{PA. R. CRIM. P. 305C(2).}
\textsuperscript{93} \textit{Id.}
\textsuperscript{94} \textit{Id.}
\textsuperscript{95} \textit{See text accompanying note 40 supra.}
\textsuperscript{96} \textit{PA. R. CRIM. P. 305C(2)(a).}
\textsuperscript{97} \textit{Id.}
\textsuperscript{98} \textit{Id. 305B(1)(e).}
\textsuperscript{99} \textit{Id. 305C(2)(a).}
prosecutor must turn over all reports whether he plans to use them at trial or not;\(^\text{100}\) the defendant need turn over only those which he plans to use at trial.\(^\text{101}\) The prosecutor must turn over results of polygraph examinations even though those results cannot be admitted as evidence at trial;\(^\text{102}\) should the defendant submit to a private polygraph examination, there is no provision that such a report could be discovered by the prosecution.\(^\text{103}\)

Subsection C(2)(b) is the reciprocal of B(2)(a),\(^\text{104}\) and provides for the production of names and addresses of eyewitnesses:\(^\text{105}\)

(b) the names and addresses of eyewitnesses whom the defendant intends to call in its case in chief, provided that the defendant has previously requested and received discovery under paragraph B(2)(a).\(^\text{106}\)

The defendant's duty to produce only the names of those eyewitnesses he intends to call at trial\(^\text{107}\) contrasts once again with the prosecutor's duty to produce the names and addresses of all eyewitnesses.\(^\text{108}\) There is no requirement that the defendant provide the prosecutor with statements made to him (or to his counsel) by the eyewitnesses. Such statements are required from the prosecutor, if the court so orders, but only for those eyewitnesses whom he expects to call at trial.\(^\text{109}\) Like subsection C(2)(a),\(^\text{110}\) C(2)(b) conditions a prosecutor's right to obtain discovery on a prior similar request by the defense.\(^\text{111}\)

4. Continuing Duty to Disclose

Section D of the rule establishes a continuing duty to disclose even during the course of the trial:

D. \textsc{continuing duty to disclose}:

If, prior to or during trial, either party discovers additional evidence or material previously requested or ordered to be disclosed by it, which is

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100. \textit{Id.} 305B(1)(e).
101. \textit{Id.} 305C(2)(a).
102. \textit{Id.} 305B(1)(e).
103. This limitation makes sense in light of the constitutional limitations on the scope of pretrial discovery flowing from defendant to prosecutor. One could assume defendant would use all favorable evidence at trial, and that that evidence would be discoverable. Compelling the production of inculpatory evidence would violate defendant's fifth amendment rights. \textit{See Allis, supra} note 80, at 488-99; \textit{Louisell, supra} note 56, at 87-90; \textit{Note, supra} note 80, at 810-19. Such inculpatory evidence is evidence which defendant would also not be expected to present at trial. Therefore, limiting producible material to what defendant will use at trial is the same as saying material whose production will not violate defendant's fifth amendment rights.
106. \textit{Id.}
107. \textit{Id.}
108. \textit{Id.} 305B(2)(a).
109. \textit{Id.}
110. \textit{Id.} 305C(2)(a).
111. \textit{Id.} 305C(2)(b).
subject to discovery or inspection under this rule, or the identity of an additional witness or witnesses, such party shall promptly notify the opposing party or the court of the additional evidence, material or witness.\textsuperscript{112}

Interestingly enough, the draftsman used in this provision the word "witness" rather than "eyewitness."\textsuperscript{113} Arguably, the witness discoverable under this section must be an eyewitness discoverable under B(2)(a)\textsuperscript{114} or C(2)(b),\textsuperscript{115} but there is room to argue that since the witness clause follows the conjunction "or" and is not modified by the phrase "subject to discovery or inspection under this rule," that it, in fact, imposes an additional affirmative duty on the parties.\textsuperscript{116}

5. Remedy

Judicial choice of remedies is set forth in section E:\textsuperscript{117}

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, the court may order such party to permit discovery or inspection, may grant a continuance, or may prohibit such party from introducing evidence not disclosed, other than testimony of the defendant, or it may enter such other order as it deems just under the circumstances.\textsuperscript{118}

There is broad discretion lodged in the trial judge to select an appropriate statutory remedy or to fashion a remedy to suit particular circumstances.\textsuperscript{119} Such a remedy would always be subject to the defendant's fifth and sixth amendment rights under the United States Constitution.\textsuperscript{120} Query whether prohibiting defendant's witnesses from testifying as a sanction for the defendant's failure to comply with a discovery order is violative of his sixth amendment rights.\textsuperscript{121}

6. Protective Orders

All the provisions of rule 305 are subject to the court's authority to grant a protective order denying or limiting discovery in a particular instance:\textsuperscript{122}

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{112} Id. 305D.
\item\textsuperscript{113} Id.
\item\textsuperscript{114} Id. 305B(2)(a).
\item\textsuperscript{115} Id. 305C(2)(b). See text accompanying notes 57 & 106 supra.
\item\textsuperscript{116} See text accompanying notes 67–69 supra.
\item\textsuperscript{117} PA. R. CRIM. P. 305E.
\item\textsuperscript{118} Id.
\item\textsuperscript{119} Id.
\item\textsuperscript{120} See note 80 supra.
\item\textsuperscript{121} Although the sixth amendment only guarantees compulsory process for obtaining witnesses in his favor, U.S. CONST. amend. VI, could it be argued that such a guarantee, by implication, extends to the defendant the right to have favorable witnesses testify if they exist? Whether or not defendant could be deprived of that right by his own violation of a procedural rule is questionable.
\item\textsuperscript{122} PA. R. CRIM. P. 305F.
\end{itemize}
\end{footnotesize}
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 of any party, the court may permit the showing to be made, in whole or in 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 showing in camera, the entire text of the statement shall be sealed and preserved in the records of the court to be made available to the appellate court(s) in the event of an appeal.123

When will the court issue such a protective order? For what reasons will such an order issue? What must be shown? What showing is sufficient? It is clear that the rule makes no attempt to define circumstances which might give rise to the issuance of a protective order. Whether courts will look for guidance to the federal criminal practice124 or the state civil practice125 will have to be determined as these rules are implemented.

7. **Work Product**

The last section of rule 305 deals with the immunity of work product:126

> Disclosure shall not be required of legal research or of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of the attorney for the Commonwealth or the attorney for the defense, or members of their legal staffs.127

This provision is similar in scope to the absolute exception from discovery given under the Federal Rules of Civil Procedure to “the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.”128 Nondiscussible work product is therefore limited by rule 305 to “opinions, theories or conclusions,”129 but only as they are reflected in the product of lawyers.130 Excluded from this exception are policemen, investigators, and other personnel who might be involved in the case on either side. Any production of material or information from one other than a lawyer will be discoverable or, at least, will not be exempt from discovery because of the work product immunity. Whether or not material properly defined as work product under this provision would be discoverable in a case for which the work was not specifically prepared is questionable. The state civil counterpart131 to rule 305G has been so interpreted; that is, work product enjoys an absolute

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123. *Id.*
124. *See* note 173 and accompanying text *infra.*
125. *See* note 179 and accompanying text *infra.*
126. *Pa. R. Crim. P. 305G.*
127. *Id.*
129. *Pa. R. Crim. P. 305G.*
130. *Id.*
131. *Pa. R. Civ. P. 4011(d).*
immunity only to the extent that it is sought to be discovered in the proceeding for which it was prepared. The Federal Rules of Civil Procedure, however, have been interpreted to grant absolute immunity to “the mental impressions, conclusions, opinions, or legal theories of an attorney” whenever the production of such material has been sought. If the former interpretation is adopted, that of limited immunity, it is possible that prosecutors and defense lawyers will alter their mode of reporting for fear that those reports will be discoverable in a subsequent proceeding, and it is arguable that those alterations may adversely affect the efficiency and quality of the criminal justice system.

III. The Federal Rule for Pretrial Discovery and Inspection

The federal counterpart to the new Pennsylvania rule 305 is rule 16 of the Federal Rules of Criminal Procedure. Passed originally in 1946, it has undergone several major amendments. The federal rule lists the items of information that are subject to disclosure by the government. With the exception of one, all the provisions of this section of the federal rule are mandatory, as evidenced by the phrase “the government shall,” rather than “the government may.”

The criminal defendant in a federal case may obtain his statement, not only in written or recorded form but also in any form which reflects the

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134. For one opinion of what effect discovery rules could have on prosecutorial work product, see Louisell, supra note 56 at 91–92.
136. Although rule 16 was originally promulgated in 1946, the more liberalized version did not appear until 1966. That rule was subsequently amended in 1974 and 1975. For the legislative history of the Federal Rules of Criminal Procedure Amendments Act of 1975, see H.R. Rep. No. 94–247, 94th Cong., 1st Sess. 2–3 (1975), reprinted in [1975] U.S. Code Cong. & Ad. News 674, 684–88. Certain changes were made by the House Conference Committee to the proposed amendments among which was the elimination of the requirement to supply witness lists to opposing counsel. See H.R. Rep. No. 94–414, 94th Cong., 1st Sess. 2 (1975), reprinted in [1975] U.S. Code Cong. & Ad. News 713, 716. The report states: A majority of the Conferes believe it is not in the interest of the effective administration of criminal justice to require that the government or the defendant be forced to reveal the names and addresses of its witnesses before trial. Discouragement of witnesses and improper contacts directed at influencing their testimony, were deemed paramount concerns in the formulation of this policy.
138. One sentence of Rule 16 begins thusly: “Where the defendant is a corporation, partnership, association or labor union, the court may grant . . . discovery . . . .” Id. 16(a)(1)(A) (emphasis added).
139. Id. 16(a)(1)(A)-(D).
substance of any oral statement. In this regard, rule 305 tracks the federal rule. Under the federal rule, however, there are limitations placed on the producibility of the substance of an oral statement. The government must intend to offer it in evidence at trial, and the statement must have been made by the defendant in response to interrogation by a person known by the defendant to be a government agent. No such limitations appear in the Pennsylvania rule. Any investigative report that contains interviews with people who have talked with the defendant and who have revealed the substance of those conversations could be subject to disclosure under the state rule. The names and addresses of those people, whether or not they are potential witnesses at trial, are discoverable as well.

The defendant's prior criminal record is discoverable under both the federal and the Pennsylvania rules. Access to documents and tangible objects is more restricted under the Pennsylvania rule than under the federal rule. Under the Pennsylvania rule, the defendant must always satisfy the condition of materiality to the instant case before being granted access to documents and tangible objects. Under the federal rule, however, defendant may obtain access upon showing any one of three conditions — materiality, the intention of the government to use the information at trial, or the fact that such information was obtained from or belonged to the defendant. The difference between the two rules may not be significant, however, because the Pennsylvania courts could always define the information falling into the second and third categories listed above as "material to the instant case" for purposes of the Pennsylvania rule. By so defining the scope of materiality, the courts would harmonize this provision of the state rule with its federal counterpart.

140. Id. 16(a)(1)(A). In United States v. Lewis, 511 F.2d 798 (D.C. Cir. 1975), the court held that the defendant was entitled to receive the substance of oral statements which the defendant had made to a police officer which the police officer subsequently orally reported to the prosecutor. Id. at 801–02.


142. FED. R. CRIM. P. 16(a)(1)(A).

143. Id.

144. PA. R. CRIM. P. 305B(1)(b).

145. Id.

146. Id. See notes 37–39 and accompanying text supra. In United States v. Feinberg, 502 F.2d 1180 (7th Cir. 1974), cert. denied, 420 U.S. 926 (1975), the court of appeals denied defendant access to statements made by him to third persons not on the basis that such statements were not discoverable but on the basis that they were protected by the Jencks Act. Id. at 1182. See note 170 infra.

The Pennsylvania rule relates to inculpatory statements only. Exculpatory statements would be classified as Brady material and, therefore, do not need to be subject to statutory compulsion. See Brady v. Maryland, 373 U.S. 83 (1973); note 28 and accompanying text supra. Whether or not a statement which is neutral on its face, but which leads to the discovery of inculpatory evidence or which provides the missing link in a chain of inculpatory evidence is itself an inculpatory statement subject to disclosure must await judicial determination.


149. FED. R. CRIM. P. 16(a)(1)(C).
The federal rule does not specify polygraph results in its provision dealing with scientific reports and tests.\(^\text{150}\) However, the language of the provision is broad enough to allow the argument that a polygraph test was a scientific test and that it was material to one's defense to inspect the results of that test. By specifically including the reports of such tests in the new rule 305, however, the Pennsylvania Supreme Court has indicated that such information may not be excluded.\(^\text{151}\)

Section (a)(2) of rule 16 differs markedly from the Pennsylvania rule:

Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), and (D) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.\(^\text{152}\)

More like its civil counterpart,\(^\text{153}\) the rule protects the work product of the government's agents, not just the lawyers.\(^\text{154}\) It also protects against the disclosure of statements of government witnesses, which are discoverable under the Pennsylvania rule, at least when made by eyewitnesses\(^\text{155}\) and conceivably when made by other witnesses.\(^\text{156}\) Whether or not the federal criminal defendant could obtain defense witnesses' statements made to the prosecutor is not clear from reading the statute.\(^\text{157}\)

What the Pennsylvania prosecutor has to disclose that his federal counterpart arguably does not, therefore, are identification evidence,\(^\text{158}\) transcripts and recordings of electronic surveillance,\(^\text{159}\) names and addresses of eyewitnesses,\(^\text{160}\) statements of eyewitnesses the prosecutor intends

\(^{150}\) Id. 16(a)(1)(D).

\(^{151}\) PA. R. CRIM. P. 305B(1)(e). See text accompanying note 40 supra.

\(^{152}\) FED. R. CRIM. P. 16(a)(2).

\(^{153}\) FED. R. CIV. P. 26(b)(3). See text accompanying note 128 supra.

\(^{154}\) FED. R. CRIM. P. 16(a)(2). See text accompanying note 128 supra & notes 197–98 and accompanying text infra. The Supreme Court held in United States v. Nobles, 422 U.S. 225 (1975), that, even though a report prepared by a defense staff's investigator would be work product within the meaning of rule 16, the immunity was waived as to that report when the defense counsel called the investigator to testify to events which were the subject of that report at trial. Id. at 238–39. The Court acknowledged that use at trial of materials subject to work product immunity would not always constitute a waiver. Id. at 239 n.14. In Nobles, however, there was a waiver of that immunity when the prosecutor attempted to make testimonial use of those materials. Id.


\(^{156}\) See note 69 and accompanying text supra.

\(^{157}\) Section (a)(2) of rule 16 refers only to "statements made by government witnesses" and is silent as to statements made by defense witnesses. FED. R. CRIM. P. 16(a)(2).

\(^{158}\) PA. R. CRIM. P. 305B(1)(d). See text accompanying note 40 supra.

\(^{159}\) PA. R. CRIM. P. 305B(1)(g). See notes 51–55 and accompanying text supra. Evidence of electronic surveillance has been held to be discoverable in the federal courts, however. See United States v. Machi, 324 F. Supp. 153 (E.D. Wis. 1971).

\(^{160}\) PA. R. CRIM. P. 305B(2)(a). See text accompanying note 57 supra.
to call at trial,161 statements of codefendants and coconspirators,162 and anything specific that might fall into the catchall provision defined as "any other evidence."163

The federal criminal defendant need produce information only if he has requested disclosure by the government and if the government has complied.164 His production of documents and tangible objects or examinations and tests need only be those that he plans to use or introduce at trial.165 This makes sense when one stops to think that the defendant will usually use all favorable evidence at trial, and no unfavorable evidence could be compelled from him in any event because of his fifth amendment privilege.166 Unlike the Pennsylvania rule, the work product immunity of the federal rule extends to agents of defense counsel.167 Statements made by any witnesses, government or defense, are not discoverable under the rule.168 Of course, both sides may obtain statements from all of the witnesses by interviewing them,169 but those statements need not be turned over to the opposing counsel until and unless that witness has testified at trial.170

The continuing duty to disclose under the federal rule171 is almost identical to that under rule 305 except for the clause in rule 305 relating to additional witnesses.172 Similarly, the federal remedy and protective order provisions have been incorporated in the new state rule almost word for word.173

165. Id.
166. U.S. CONST. amend. V. See note 103 supra.
168. Id.
169. See note 177 and accompanying text infra.
   (a) In any criminal proceeding 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) shall be the subject of subpoena [sic], discovery, or inspection until said witness has testified on direct examination in the trial of the case.
Id. The act derives its name from the case of Jencks v. United States, 353 U.S. 657 (1957), in which the Supreme Court held that counsel for defendant Jencks, who was being tried for filing a false non-Communist affidavit under the Taft-Hartley Act, should have been given the statement of an F.B.I. informant to use in his cross-examination of that prosecution witness. Id. at 668–69. See also Rooney & Evans, Let's Rethink the Jencks Act and Federal Criminal Discovery, 62 A.B.A.J. 1313–16 (1976).
171. Fed. R. CRIM. P. 16(c).
172. PA. R. CRIM. P. 305D. See text accompanying note 112 supra.
173. See Fed. R. CRIM. P. 16(d)(1)–(2); PA. R. CRIM. P. 305E-F. See also text accompanying notes 118 & 123.
IV. Discovery Rules in Civil Procedure

Pretrial discovery is not new in civil litigation. Discovery rules at both the state\textsuperscript{174} and federal\textsuperscript{175} levels have long been subjected to judicial interpretation. Whether state judges applying the rules to criminal cases will adopt some of the policies heretofore expounded in civil cases remains to be seen.

The most noticeable difference between rules of civil procedure and rules of criminal procedure is that most pretrial discovery in civil litigation is accomplished through the use of depositions.\textsuperscript{176} In criminal proceedings, both defendant and prosecutor are free to question witnesses without permission from each other.\textsuperscript{177} Of course, the identity of those witnesses may be unknown by the other side, which is why such information arguably should be subject to the new criminal discovery rule.\textsuperscript{178}

Unlike rule 305, rule 4011 of the Pennsylvania Rules of Civil Procedure details specific instances when discovery will not be permitted and when a protective order should issue.\textsuperscript{179} One type of discovery prohibited is that which "would disclose the existence or location of reports, memoranda, statements, information or other things made or secured by any person or party in anticipation of litigation or in preparation for trial or would obtain any such thing from a party or his insurer, or the attorney or agent of either of them other than information as to the identity or whereabouts of witnesses. . . ."\textsuperscript{180} Not only are mental impressions of lawyers protected by

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\textsuperscript{174} PA. R. CIV. P. 4001-4025.
\textsuperscript{175} Fed. R. Civ. P. 26-37.
\textsuperscript{176} In the Pennsylvania Rules of Civil Procedure relating to depositions and discovery, rules 4002, 4003, 4004, 4007, 4015, 4016, 4017.1, and 4020 all deal specifically with depositions. Similarly, in the Federal Rules of Civil Procedure, rules 27, 28, 30, 31, and 32 refer specifically to depositions.
\textsuperscript{177} Commonwealth v. Mullen, 460 Pa. 336, 333 A.2d 755 (1975) (held that permitting a defendant to call prospective prosecution witnesses at a preliminary hearing does not conflict with rules relating to discovery in criminal cases as those rules are inapplicable to such a situation); Lewis v. Court of Common Pleas of Lebanon County, 436 Pa. 296, 260 A.2d 184 (1969) (held that rule of pretrial discovery in criminal cases does not apply where defendant seeks pretrial interview with a prosecution witness, and that in the absence of "exceptional circumstances or compelling reasons," the prosecution may not interfere with such an interview).
\textsuperscript{178} See note 69 and accompanying text supra.
\textsuperscript{179} PA. R. CIV. P. 4011. The rule reads, in part, as follows:
   No discovery or inspection shall be permitted which
   (a) is sought in bad faith;
   (b) causes unreasonable annoyance, embarrassment, expense or oppression to the deponent or any person or party;
   (c) relates to matter which is privileged or would require the disclosure of any secret process, development or research;
   (d) would require the making of an unreasonable investigation by the deponent or any party or witness; or
   (f) would require a deponent, whether or not a party, to give an opinion as an expert witness, over his objection.
   \textit{Id.}
\textsuperscript{180} Id. 4011(d).
this provision, but any product of any person prepared in anticipation of trial is protected. For example, statements of eyewitnesses which are not in a lawyer's work product and are, therefore, discoverable under the new rules of criminal procedure might not be discoverable under the state civil rules if they were in a report protected by this broader work product provision. As stated earlier, the state civil rule has been held to provide immunity only in the particular proceeding for which the work was done, with the result that such work product would lose its immunity at the end of that litigation. The new rules of criminal procedure relating to discovery immunize far less material than the rules of civil procedure because the criminal rules restrict those classes of people covered by the work product immunity, thus reducing the application of this provision.

At the federal level, much of civil pretrial procedure involves rules controlling the taking of depositions and the use of those depositions at trial. Like the state rules of civil procedure, the federal rules include a scope provision — any material which is privileged is exempt from discovery. Although rule 305 is silent about privileged information, one could reason that such information would be the proper subject of a protective order. The attorney-client privilege and several others are protected by statute in Pennsylvania. It follows that these and the other

181. Id. See text accompanying notes 127–29 supra and text accompanying note 201 infra.
184. See text accompanying note 180 supra.
186. See text accompanying notes 129 & 130 supra.
190. The state rules of civil procedure specifically protect privileged matter. Pa. R. Civ. P. 4011(c). See note 179 supra. No such provision is found in rule 305. In the comments following rule 305, the court suggests that "[i]n determining the extent to which pretrial discovery should be ordered . . . judges [might] be guided by the . . . general principles of the ABA Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970)." Pa. R. Crim. P. 305, Comment.
191. The court then quotes the following section from the ABA Standards:
In order to provide adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process, discovery prior to trial should be as full and free as possible consistent with protection of persons, effective law enforcement, the adversary system, and national security.
common law privileges could be invoked to block access to certain information. 192

There is a caveat in the federal rule relating to the admissibility of evidence at trial: 193 Information sought through discovery does not have to be admissible at trial as long as it is reasonably calculated to lead to the discovery of admissible evidence. 194 Not only does the new rule 305 not provide this limitation, but it specifically mandates the production of certain items which are not or may not be admissible at trial, such as the defendant's prior record 195 and results of polygraph tests. 196

The work product exception in the Federal Rules of Civil Procedure is much more liberal in its scope than its counterpart in the state criminal rules, and more liberal in the extent of its duration than its counterpart in the state civil rules. 197 It extends the immunity to a "party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent)." 198 Rule 305 limits the immunity to lawyers, 199 while the state rules of civil procedure extend the immunity to "any person or party." 200 Only "mental impressions, conclusions, opinions, or legal theories" are subject to absolute immunity under the federal civil rule 201 and new rule 305. 202 The


193. Fed. R. Civ. P. 26(b)(1). The provision reads: "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Id.


197. See Fed. R. Civ. P. 26(b)(3). The rule states in part:

Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Id.

198. Id.


202. See text accompanying notes 127 & 130 supra.
federal rule immunizes that work, however, when it is produced by lawyers or nonlawyers, while the state law limits immunization only to lawyers.\textsuperscript{203} Although the federal rule is silent on its face as to the duration of the immunity, the courts have interpreted this absolute immunity to protect such work product even in subsequent litigation.\textsuperscript{204} As stated earlier, the state civil rule has been interpreted as applying the immunity only to the instant litigation.\textsuperscript{205} The United States Supreme Court in \textit{Hickman v. Taylor}\textsuperscript{206} indicated in dictum that this narrowly defined segment of work product — mental impressions, conclusions, opinions, or legal theories — should be protected in subsequent litigation;\textsuperscript{207} an interpretation of the new rule 305 consistent with the dictum in \textit{Hickman} would seem to be more prudent than one that would limit immunity to the litigation for which it was prepared.

The federal rule regarding expert witnesses\textsuperscript{208} is far more restrictive than the new state criminal rule.\textsuperscript{209} At the federal civil level, only those experts who are to be called at trial are subject to discovery procedures.\textsuperscript{210} In rule 305, all expert opinions and reports are subject to discovery.\textsuperscript{211}

Although the federal rule is less specific about the propriety of a protective order\textsuperscript{212} than the state civil rule,\textsuperscript{213} it is more specific than rule 305.\textsuperscript{214} The federal rule reads:

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . .\textsuperscript{215}

Compare this with the phrase “upon a sufficient showing” which introduces the protective order provisions under rule 305.\textsuperscript{216} It is conceivable that the state courts might look to the federal rule as an aid in defining the

\textsuperscript{203} PA. R. CRIM. P. 305G. See text accompanying notes 130, 197 & 198 supra.
\textsuperscript{204} See generally cases cited note 133 supra. See also text accompanying note 133 supra.
\textsuperscript{206} 329 U.S. 495 (1947).
\textsuperscript{207} Id. at 509–14.
\textsuperscript{208} Fed. R. Civ. P. 26(b)(4).
\textsuperscript{209} PA. R. CRIM. P. 305B(1)(e). See text accompanying note 40 supra.
\textsuperscript{211} PA. R. CRIM. P. 305B(e).
\textsuperscript{212} Fed. R. Civ. P. 26(c).
\textsuperscript{213} PA. R. CRIM. P. 4011. See note 179 and accompanying text supra.
\textsuperscript{214} PA. R. CRIM. P. 305F. See text accompanying note 123 supra.
\textsuperscript{215} Fed. R. Civ. P. 26(c).
\textsuperscript{216} PA. R. CRIM. P. 305F. See text accompanying note 123 supra.
circumstances which would satisfy the requirements of "a sufficient showing."

Whether or not the judicial interpretations that have followed the promulgation of rules of civil procedure at the federal and state levels will be made applicable to rule 305 as the courts apply it is open to speculation. The civil and criminal proceedings are diverse entities, and any procedural rules must be predicated on different assumptions. In civil proceedings, true adversaries come to court to settle disputes between them. Criminal proceedings, however, require that the prosecutor be the representative of the commonwealth, not only as an adversary of the accused, but also as a "doer of justice." The concept of fairness in civil litigation takes on an air of convenience to the parties, but in criminal proceedings, the concept expands to constitutional dimensions. It is submitted that the courts should recognize that, although the concept of criminal discovery rules evolved from the use of such procedures in civil litigation, the criminal rules function in an expanded arena. The criminal rules, although they purport to establish only procedure, must be interpreted and applied not as the civil rules, but in a manner which reflects and admits of their true substantive nature.

V. Conclusion

What does rule 305 mean to the criminal justice system? As yet there is no answer to this question, although one may offer predictions based upon the many studies and evaluations of liberalizing criminal discovery rules in other forums.

One commentator recently stated the problem thusly:

Few problems of litigation today so intimately intermix practical, earthy considerations of feasibility and "common sense" with jurisprudential


219. See notes 32-36, 49, 87 & 121 and accompanying text supra.

220. For the historical development of rules of criminal procedure, see Fletcher, Pretrial Discovery in State Criminal Cases, 12 Stan. L. Rev. 293, 294-97 (1960).

conundrums, as does that of discovery in criminal cases. Pity the trial judge faced, on the one hand, with the burgeoning acceptability of criminal discovery by his appellate masters, grounded in their realization that any rational system of settling disputes, whether or not adversary, must make available to the participants the underlying data; and on the other hand, with his own honest belief that to grant the discovery motion before him will facilitate all manner of evil conniving by the defendant member of a notorious criminal enterprise. How can the trial judge be rational, and at the same time, sensible? And how can the appellate courts — or legislatures for that matter — establish guides flexible enough to take account of realities, without committing the matter to the trial judges’ unfettered “discretion” — little more than a euphemistic slogan for leaving the trial bench wholly at large and therefore, potentially, wholly arbitrary?  

In general, the arguments proffered to maintain the status quo or to restrict criminal discovery are that broader pretrial discovery would result in a perjured defense, danger to and abuse of prospective prosecution witnesses, and at most only unilateral discovery due to a criminal defendant’s fifth amendment privilege.

Countering such arguments are advocates of broader discovery rules who believe that those arguments are based on faulty premises, and that experience under liberalized rules in some jurisdictions has been successful in proving just that.

In Pennsylvania, there are some who feel that the changes in the laws which control the criminal justice system should be reviewed by the elected representatives of the people. Representative D. Michael Fisher has proposed, in House Bill 1490, that the state constitutional provision which authorizes the Supreme Court of Pennsylvania to prescribe certain procedural rules for the administration of justice in the commonwealth be amended to require that rules of criminal procedure be submitted to the judiciary committees of both houses for review. A general review of all criminal procedure rules now in effect is provided by a schedule following the proposed amendment.

222. Louisell, supra note 56, at 56 (footnote omitted).
223. See, e.g., Brennan, supra note 221, at 289; Louisell, supra note 56, at 87–101.
224. Krantz, supra note 221, at 138–39; Rooney & Evans, supra note 170, at 1315–16.
227. The following sentences would be added to the constitutional provision:

All rules of criminal procedure promulgated by the Supreme Court pursuant to this section shall be submitted by the Chief Justice to the General Assembly no later than May 1 of each year and shall be referred to the judiciary committees of both Houses. Such criminal rules shall take effect 90 days after their submission unless the General Assembly expresses its intent to the contrary by concurrent resolution and rejects them in whole or in part.


228. The section provides:

One year after the effective date of this amendment, all rules of criminal procedure previously adopted by the Supreme Court shall be deemed suspended.
As of January 1, 1978, the battle lines are drawn. On one side, there are advocates of restrictive pretrial discovery rules for criminal procedure,229 and, on the other side, there are those who argue to the contrary.230 There are also members of the commonwealth's body of elected representatives who insist that the supreme court should not be the final arbiter of matters of criminal procedure231 — matters which arguably, though labelled procedural, fall precipitously close to the constitutional limitation forbidding the court to promulgate rules to enlarge or modify substantive rights.232

Regardless of the fate of House Bill 1490,233 the new rule will go into effect and would not be subject to the review procedure prescribed in the bill until one year after the amendment had been passed.234 Therefore, the criminal justice system will be forced to adapt to the new rule, at least temporarily.

It is submitted that there will be very little change in the criminal justice process for a number of reasons. Firstly, most trial courts have granted discovery beyond the limits of the old rule 310. Secondly, prosecutors have voluntarily allowed defense counsel access to the prosecution's evidence in many situations either in a spirit of cooperation or to induce plea bargains. Witnesses' statements, although not available to defense counsel before trial, have been subject to production at trial at which time defense counsel could ask for a continuance to give him the opportunity to study the statement before continuing with the proceeding. Lastly, exculpatory material is already constitutionally compelled by the United States Constitution under the Brady doctrine.235 Under present operating procedures, the criminal defendant, although not statutorily entitled to broad pretrial discovery nor to judicial or statutory remedies if such discovery is not forthcoming, has, practically speaking, many of the advantages of rather broad pretrial discovery.

Controversy over the new rule will most likely focus on the area of the work product immunity. Under the new rule 305, the immunity is very narrowly defined.236 Only slight protection remains for the work product of the prosecutorial team. How closely rule 305 will cut to the permissible edge must be a question on the minds of many prosecutors.

unless submitted to the General Assembly for approval as provided in this amendment within the one-year period.

Id.

229. See note 223 and accompanying text supra.
230. See note 224 and accompanying text supra.
231. See notes 225–28 and accompanying text supra.
232. For a case in which the court decided a matter first on substantive grounds — violation of the federal constitution — and then, on remand, held that the prior decision had been based upon procedural grounds solely within its supervisory powers, see Commonwealth v. Campana, 452 Pa. 233, 304 A.2d 432, cert. granted, vacated, remanded, 414 U.S. 808 (1973), on remand, 455 Pa. 622, 314 A.2d 854 (addendum opinion), cert. denied, 417 U.S. 969 (1974).
233. House Bill 1490 was reported out of the House Judiciary Committee by Representative Berson on December 6, 1977. It was tabled, and, pursuant to House Rule 22, was automatically reactivated 15 legislative days later.
234. See note 228 supra.
235. See note 28 supra.
236. See notes 126–34 and accompanying text supra.
No one could rationally object to having as a goal a more efficient system of criminal justice, but, in interjecting a new procedure, one must take care not to upset the delicate balance between a criminal defendant's right to a fair trial and the commonwealth's right, on behalf of its citizens, to prosecute vigorously violations of the criminal law. To promote one over the other by means of a procedural device is to do injustice to both.

Madeline Hartsell Lamb