more at his disposal than the defendant's version of the facts.[2] Of course, the defense burden is enlarged when the defendant is unable to post bail and therefore must assist in the preparation of his defense from a jail cell. Furthermore, while the prosecutor is precluded by the defendant's privilege against self-incrimination from submitting formal interrogatories to him, he can make full use of whatever admissions or confessions the defendant may have made when he was interrogated by police authorities.[3]

In opposing any liberalization of a defendant's opportunities for obtaining information about the prosecution's case, law enforcement officials contend that a defendant who is fully apprised of the evidence to be offered against him may seek to tamper with the witnesses, to intimidate them into remaining silent, or to suborn perjury.[4] Witnesses, it has been suggested, would be much less willing to come to the police with information if they were aware that the defendant would learn before trial of their identity and probable testimony and so might try to suppress their evidence by one means or another. Furthermore, it is argued that since the opportunities for the prosecution to obtain discovery from the defendant are limited at the threshold by the privilege against self-

[2] If the effective assistance of defense counsel is to be truly meaningful in the representation of indigents, provision should be made for qualified investigators to aid the defense attorney, whether he be assigned counsel or a public defender. Insofar as indigent defendants are concerned, it is encouraging to note the efforts which are being made to increase the likelihood that an indigent defendant will be released prior to trial, rather than kept in jail because he cannot make bail. The availability of the defendant to assist in investigating the facts before trial is often much more important than the availability of discovery devices. Sometimes a defendant is provided with formidable investigative assistance by his liability insurance carrier if the criminal charges pertain to an accident which may also involve extensive civil liability.

[3] Of course, admissibility is subject to the requirement of voluntariness and, in the federal courts, to the additional requirement that upon arrest a defendant be taken "without unnecessary delay before the nearest available commissioner" for a preliminary examination. Mallory v. United States, 354 U.S. 449 (1957).

[4] Sometimes a witness can be induced to claim his own privilege against self-incrimination and thereby thwart interrogation. A federal court has recently ruled that bribery, coercion, threat, or corruptly motivated advice to induce a prospective grand jury witness to exercise his fifth amendment privilege constitutes obstructing the due administration of justice in violation of 18 U.S.C. § 1503 (1958). Cole v. United States, 329 F.2d 437 (9th Cir. 1964). How far can this view be taken? If a defendant's attorney points out to prospective Government witnesses that their testimony may prove self-incriminating and that, absent some binding assurance of immunity, it may lead to their own prosecution, has he obstructed justice? And what is the criminal liability, if any, of a prosecutor, a defense attorney, or counsel in civil litigation who emphasizes to his witnesses that they are under no obligation to talk to anyone, especially to the opposing counsel, about the pending case?

incrimination[5] and since the defendant is shielded during the trial by many procedural safeguards, such as the presumption of innocence, to add an extensive right of discovery to his arsenal might completely unbalance the odds against the state.[6]

Defense attorneys reply that unless they have access before trial to certain types of information in the hands of the prosecution, the defendant cannot really be assured of receiving a fair trial.[7] Among the items of information for which they insist discovery is needed are copies of a defendant's own statements to the police—which may be relevant in determining what plea to offer and whether to move for suppression or exclusion of certain evidence, either before or at the trial—and copies of statements made to the police by any co-defendants—which may not only be useful at the trial but also in connection with any pretrial motion for severance. Similarly, defense counsel would wish to see any statements of a probable Government witness, both as a basis for deciding what plea to enter[8] and for possible impeachment of the witness by prior inconsistent statements if his testimony at the trial varies materially from the pretrial statements. Even the statements of persons whom the Government does not plan to call as witnesses may be valuable to the

[5] This privilege, however, has generally not been considered as a bar to statutes requiring that a defendant give notice of an alibi defense or of an intention to plead insanity. See Nedrud, *The Role of the Prosecutor in Criminal Procedure,* 32 U. Mo. AT KAN. CITY L. REV. 142, 159 (1964). For a case in which the California Supreme Court sanctioned the prosecution's right to obtain discovery of the names and addresses of witnesses that the defendant intended to call and of certain medical evidence which he intended to introduce in support of his defense that he was sexually impotent to commit the alleged rape, see Jones v. Superior Court, 58 Cal. 2d 56, 372 P.2d 919 (1962).

[6] For a frequently cited opinion by Chief Justice Vanderbilt in which the arguments are cogently presented against discovery in criminal cases, see State v. Tune, 13 N.J. 203, 98 A.2d 881 (1953). See also Judge Learned Hand's opinion in United States v. Garsson, 291 Fed. 646 (S.D.N.Y. 1923), and Flannery's statement of the prosecutor's position in *Symposium, Discovery in Federal Criminal Cases,* 33 F.R.D. 47, 74-81 (1963).

[7] See Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure,* 69 YALE L.J. 1149 (1960); Louisell, *Criminal Discovery: Dilemma Real or Apparent?,* 49 CALIF. L. REV. 56 (1961); Pye, *Symposium, supra* note 6, at 82-94.

[8] Sometimes a view of the statements of Government witnesses will lead a defense counsel to suggest to his client that he plead guilty, either to the offense charged or to some lesser included offense. With this in mind, prosecutors are probably quite willing to show the defense counsel a substantial portion of their file when they consider that they have an airtight case. Of course, if the prosecutor, while showing defense counsel only a portion of his file, fails to disclose documents which contain evidence favorable to the accused and does not make it clear to defense counsel that he may not be seeing all the available documents, a plea of guilt subsequently entered on the advice of defense counsel might be attacked on due process grounds. Compare Brady v. Maryland, 373 U.S. 83 (1963).

defense in suggesting the availability of evidence which might aid its theory of the case.

To supplement the discovery of testimony expected from a Government witness, a defense counsel would also wish to receive information pertinent to his credibility, especially information concerning any criminal record the witness might have. While a prosecutor, either in a federal or state court, generally is able to ascertain the criminal record of the defendant or of any witness by requesting this information from the Federal Bureau of Investigation, a request by a defense attorney for similar information will almost always prove unavailing.[9] Although the attorney is free at the trial to cross-examine any witness concerning his prior convictions in order to impeach his credibility, this method of impeachment is subject to several legal and practical limitations.[10]

To the extent that a defendant lacks funds for performing relevant scientific tests, the results of any such tests performed by Government experts will be especially valuable.[11] Moreover, even a wealthy defendant may find, when he begins preparing his defense, that it is too late to perform some of the scientific tests which might be important in establishing his innocence and that, therefore, unless he can obtain results of the Government-performed tests, there is no way for him to procure the necessary information. Moreover, in some instances, the physical objects upon which the defendant desires to have tests performed may be in the hands of the prosecution for use as evidence at the trial, so that, without either the cooperation of the prosecution or the intervention of the court, it will be impossible to have the tests made.

The problem of discovery also arises in connection with sentencing, when the trial judge may rely on a presentencing report prepared by a probation officer or other official. While in a few states the defendant and his counsel have access to this report and therefore have an opportunity to rebut or to supplement the in-

[9] Dean Pye discusses and illustrates this problem in *Symposium, supra* note 6, at 87-88. He also describes the results of a mixup which for a short period of time made this information available to attorneys for indigent defendants in the District of Columbia.

[10] See McCORMICK, EVIDENCE § 43 (1954 ed.); 3 WIGMORE, EVIDENCE §§ 980, 981, 1003, 1005 (3d ed. 1940) [hereinafter cited as WIGMORE].

[11] For some comments on legal problems connected with the use of new scientific techniques in criminal investigation, see Everett, *New Procedures of Scientific Investigation and the Protection of the Accused's Rights*, 1959 DUKE L.J. 32.

formation it contains, in the federal courts and in most state courts no requirement exists that the defense be made aware of the contents of the report prior to sentencing,[12] although, of course, the judge may choose to reveal the contents. Many defense attorneys argue that even if the confidentiality of the presentencing report makes it easier for the court to obtain pertinent information, this advantage is offset by the hardship to a defendant which may result when the report contains erroneous derogatory information which the accused never has an opportunity to rebut.

I

CURRENT FEDERAL DISCOVERY PRACTICE

The Federal Rules of Criminal Procedure make some provision for discovery by a defendant in criminal cases. Rule 5 (c) provides for a preliminary examination before a United States commissioner following an arrest, at which time the defendant has an opportunity to hear the evidence against him, to cross-examine witnesses, and to introduce evidence in his own behalf. This preliminary examination provides far less than complete discovery. The Government need produce only enough evidence to show probable cause, and it is not precluded in any way from calling witnesses to testify at the trial who were not present at the preliminary examination. The defendant may be appearing at the preliminary examination without counsel to assist him in evaluating the evidence or in cross-examining the Government witnesses.[13] Moreover, there is no requirement of a preliminary examination if a grand jury has already returned an indictment.[14] Thus, the United States attorney may eliminate any opportunity for a preliminary examination by submitting a case in the first instance to a grand jury for an indictment; and even if a defendant is arrested before an indictment is returned, the prosecutor may be able to obtain a postponement of preliminary examina-

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[12] See *Symposium, supra* note 6, at 123-28.

[13] At what time must counsel be provided for an indigent defendant? This question has become more significant since the Supreme Court's decision in Gideon v. Wainwright, 372 U.S. 335 (1963), that state courts must provide counsel for indigent defendants even in noncapital cases.

[14] Roddy v. United States, 296 F.2d 9 (10th Cir. 1961); Nelson v. Sacks, 290 F.2d 604 (6th Cir. 1961); Boone v. United States, 280 F.2d 911 (6th Cir. 1960); Barrett v. United States, 270 F.2d 772 (8th Cir. 1959); United States v. Universita, 192 F. Supp. 154 (S.D.N.Y. 1961).

tion and during the period of postponement obviate the need therefor by obtaining a grand jury indictment.[15]

Rule 7 (f) authorizes a bill of particulars. While a defendant may be able to obtain some desired information by a motion for a bill of particulars, he generally cannot use it as a means to learn of the Government's witnesses or the documents and testimony which it plans to offer.[16]

Rule 16, entitled "Discovery and Inspection," provides that upon motion of a defendant at any time after the filing of the indictment or information, the court may order that he be permitted "to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable." Several severe restrictions are implicit in the wording of this rule. For example, statements made to Government investigators by witnesses, or even by codefendants, presumably would not have been obtained "by seizure or by process" and so would not be subject under rule 16 to discovery or inspection. Similarly the results of forensic tests performed by Government experts—or, for that matter, by private experts—would not constitute items obtained "by seizure or by process." A major question exists as to whether even a written statement made by the defendant himself to law enforcement officials would constitute a "paper," "document," or "tangible object" "obtained from or belonging to" him.[17] A tape recording of an interview with the defendant by investigators would seem even less subject than a written confession to discovery and inspection under rule 16.[18]

Rule 17, entitled "Subpoena," provides in subsection (c) that

[15] United States v. Universita, *supra* note 14.

[16] See materials prepared by E. Barrett Prettyman Fellows, LAW AND TACTICS IN FEDERAL CRIMINAL CASES 128-41 (mimeographed copy 1963).

[17] See United States v. Murray, 297 F.2d 812 (2d Cir.), *cert. denied*, 369 U.S. 828 (1962); Schaffer v. United States, 221 F.2d 17 (5th Cir. 1955); Shores v. United States, 174 F.2d 838 (8th Cir. 1949); United States v. Fancher, 195 F. Supp. 448 (D. Conn. 1961); United States v. Berman, 24 F.R.D. 26 (S.D.N.Y. 1959); United States v. Zimmerman, 20 F.R.D. 587 (S.D.N.Y. 1957).

[18] Compare the holding of a Maryland lower court that the plaintiff in a civil case was not entitled to discovery of a tape-recorded interview with the defendant's claims investigator, although she would have been entitled to a copy of any signed statement which she had made. Foreman v. American Stores Co., 32 U.S.L. WEEK 2149 (Baltimore Super. Ct., Sept. 4, 1963).

> A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

The wording of this rule does not contain the express limitations upon the source of the documents and papers or the manner in which they were obtained that exist under rule 16. As the Supreme Court made clear in *Bowman Dairy Co. v. United States*,[19] "any document or other materials, admissible as evidence, obtained by the Government by solicitation or voluntarily from third persons is subject to subpoena." At the same time, however, the Court indicated that rule 17 was not intended to give a right of discovery in the broadest terms or to authorize a "fishing expedition." While rule 17 (c) seeks to expedite the trial by providing a time and place before trial for the inspection of the subpoenaed materials, it can only be used in "a good-faith effort . . . to obtain evidence."[20]

If a defense counsel does not already know the documents which are in the Government's files, he will find it difficult to describe with sufficient detail the papers which he wishes produced for inspection prior to trial under rule 17 (c), and he will accordingly run the risk of a motion by the Government to quash his subpoena on the ground either that compliance would be "unreasonable or oppressive" or that the defendant is simply engaged in a "fishing expedition" like that condemned in the *Bowman Dairy* case. In seeking to subpoena his own pretrial statements and those of prospective Government witnesses for inspection prior to trial, the defendant may also encounter objections from the United States attorney either that he is attempting to circumvent the limitations of rule 16, which deals specifically with discovery, by resort to rule 17 (c) or that pretrial statements, regardless of by whom they were made, are not the "evidence" which the Supreme Court had in mind when it interpreted rule 17 in the *Bowman Dairy* case. Of course, pretrial statements by a Government witness would only become admissible

[19] 341 U.S. 214, 221 (1951).
[20] *Id.* at 220.

after that witness had taken the stand, and then only for such purposes as impeachment or corroboration.[21] Pretrial statements by a defendant could be offered against him by the prosecution as admissions or confessions, but they could only be offered by the defendant under certain circumstances as prior consistent statements to corroborate his own testimony after he had taken the stand in his own behalf at the trial.[22]

The limited opportunity for the defendant to use as evidence at the trial any pretrial written statement made either by him or by others would suggest strongly that the draftsmen of the Federal Rules of Criminal Procedure did not intend for a defendant to be able to secure inspection of such documents in the hands of the Government under rule 17 (c) if such an inspection was unavailable under rule 16, which purports to deal specifically with discovery and inspection. Nonetheless, as the Supreme Court has noted in another connection, the plain words of rule 17 (c) "are not to be ignored."[23] Rule 17 (c) purports to deal with documentary evidence, and pretrial statements by any witness, including a defendant, often do become admissible at a trial for impeachment or corroboration purposes. Therefore, it is difficult to controvert a defendant's assertion that he is seeking inspection of pretrial statements in "a good-faith effort . . . to obtain evidence."[24] Furthermore, the Supreme Court has stated that there "was no intention to exclude from the reach of process of the defendant any material that had

[21] Impeachment by prior inconsistent statements is discussed in 3 WIGMORE §§ 1017-46, and rehabilitation of a witness by a showing of prior consistent statements is treated in 4 *id.* §§ 1122-33. Under some circumstances, a statement by a witness might also be admissible as past recollection recorded. 3 *id.* §§ 734-57. While not admissible as such, pretrial statements by a witness may also be used to refresh his present recollection of an event. 3 *id.* §§ 758-65. In such event, the document used to refresh recollection at the trial must be shown to opposing counsel on demand, and Dean Wigmore contends that this right of inspection should also apply to a memorandum consulted for refreshment of memory before trial. 3 *id.* § 762. The cases concerning the right of the cross-examiner to inspect notes used by the witness to refresh his recollection before he came to court to testify are in conflict. *Compare* People v. Estrada, 54 Cal. 2d 713, 355 P.2d 641 (1960); People v. Silberstein, 159 Cal. App. 2d 848, 323 P.2d 591 (1958); State v. Mucci, 25 N.J. 423, 136 A.2d 761 (1957), *with* Goldman v. United States, 316 U.S. 129 (1942); Scanlon v. United States, 223 F.2d 382 (1st Cir. 1955); Kaufman v. United States, 163 F.2d 404 (6th Cir. 1947); State v. Strain, 84 Ohio App. 229, 82 N.E.2d 109 (1948); Commonwealth v. Fromal, 32 U.S.L. WEEK 2259 (Pa. Super. Ct., Nov. 13, 1963).

[22] 4 WIGMORE §§ 1122-33.

[23] Bowman Dairy Co. v. United States, 341 U.S. 214, 220 (1951).

[24] *Ibid.*

been used before the grand jury or *could be used* at the trial."[25] It is almost impossible to say in advance that a pretrial statement could not be used at a trial, at least for the limited purposes of impeachment, corroboration, or refreshing recollection. Under this reasoning—and in the absence of the Jencks Act, which will be discussed later—a defendant would seem entitled to subpoena for inspection before trial any pretrial statements made by him, by a Government witness, or by a codefendant. In favor of this interpretation might also be the expediting of trials which would result from eliminating the necessity for a defense counsel to request a delay during the trial to allow him to inspect any pretrial statement or notes being used by a Government witness to refresh his memory.

Even if broadly construed, rule 17 may be of rather limited utility for an indigent defendant, who must support his motion or request for a subpoena by an affidavit in which the defendant must state the name and address of the witness, his expected testimony, the materiality of the witness' evidence to the defense, that the defendant cannot safely go to trial without the witness, and that the defendant is unable to pay the fees of the witness.[26] Certainly the showing of materiality required under this rule would not foster "a fishing expedition" by an indigent defendant, and it would seem almost impossible for him to make such a showing in support of a motion that federal investigators be subpoenaed to produce for inspection under rule 17 (c) any pretrial statements made by the defendant or by a prospective Government witness. Furthermore, the indigent defendant's affidavit required under rule 17 actually provides the Government with discovery concerning the defendant's theory of the case, and it may contain some damaging admissions which can be used against him at the trial.

Any discussion of the scope of discovery available under rules 16 and 17 must also reckon with the provisions of both rule 6 (e) and the Jencks Act.[27] Rule 6 (e) prohibits the disclosure, except to attorneys for the Government, of matters which occurred before the grand jury and thereby precludes the discovery by the defendant of any testimony given either by himself or by others before the grand jury, even though this testimony might be of value to the

[25] *Id.* at 221. (Emphasis supplied.)
[26] FED. R. CRIM. P. 17 (b).
[27] 71 Stat. 595 (1957), 18 U.S.C. § 3500 (1958).

defendant at the trial either to rehabilitate his own testimony by showing a prior consistent statement or to impeach a Government witness by showing prior inconsistent statements to the grand jury. Of course, since the United States attorney has access to the testimony given before the grand jury, the proceedings there can provide the Government with a very convenient and rather one-sided form of discovery, under circumstances where witnesses may, in the absence of counsel, inadvertently waive privileges available to them. Even though it was enacted subsequent to rule 6, the Jencks Act was considered by the Supreme Court to have no effect upon the secrecy of grand jury minutes enjoined by that rule.[28]

The Jencks Act was enacted in September, 1957 as Congress' response to the Supreme Court decision a few months earlier in *Jencks v. United States*,[29] and it is codified as 18 U.S.C. § 3500. It provides in subsection (a) that

> no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

By reason of this statute, the constitutionality of which has thus far been upheld by the Supreme Court,[30] statements made to Government investigators before trial cannot be examined by the defense attorney until the witness has actually testified on direct examination; and if the "statement" in question is contained in the minutes of a grand jury, it will generally not be subject to discovery even after the witness has testified.[31] Since the prohibition applies not only to Government witnesses but also to prospective Government witnesses, it would seem difficult to determine who might be a "prospective Government witness" for purposes of 18 U.S.C. § 3500 (a) until the prosecution has rested its case, unless prior thereto the United States attorney had announced that a witness would not be called[32] or unless it appeared at the trial that the

[28] Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959).

[29] 353 U.S. 657 (1957).

[30] Scales v. United States, 367 U.S. 203 (1961); Palermo v. United States, 360 U.S. 343 (1959).

[31] Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959).

[32] Perhaps the United States attorney will have made clear in his opening statement which witnesses he plans to call during the trial.

Government had not subpoenaed the witness and that he was not present in court.

While the enactment of the Jencks Act limited the possibilities for arguing that a defendant is entitled under rule 17 (c) to obtain a subpoena for the production before trial of statements by prospective Government witnesses, the wording of the act seems, by negative implication, to authorize some rights of discovery which might not otherwise exist under rules 16 and 17. For instance, since 18 U.S.C. § 3500 (a) expressly excludes from its coverage any "statement or report in the possession of the United States" which was made by the defendant, it would seem that the statute implicitly recognizes that a defendant's own statement is subject to discovery by him. Furthermore, since the statute precludes any pretrial "subpoena, discovery, or inspection" only with respect to "a Government witness or prospective Government witness," it can be argued that a statement by one who is not a prospective Government witness clearly was recognized by Congress as a proper subject of subpoena, discovery, or inspection.

Under this view a defense attorney would be free to request either discovery and inspection under rnle 16 or a subpoena for pretrial production and inspection under rule 17 (c) with respect to any statements or reports in the possession of the United States which were made by persons who are not prospective Government witnesses. However, the defense counsel might still encounter pitfalls insofar as relief under rule 16 is concerned because of the restrictive wording of that rule. Since the defendant would not be allowed to impeach his own witnesses, he could not claim that he was seeking to inspect the statements made by persons who were not prospective Government witnesses with a view toward using the statements for impeachment purposes. Perhaps defense counsel could satisfy the requirements of rule 17 (c), as interpreted by the Supreme Court in *Bowman Dairy*,[33] by an argument that the pretrial statements might be used in some way by the defendant as evidence—for example, as prior consistent statements to corroborate and rehabilitate a witness should he be called by the defense and

[33] Bowman Dairy Co. v. United States, 341 U.S. 214 (1951). In that case the defendant had moved for production of documents and objects obtained by the Government which were relevant to the allegations or charges.

impeached by the prosecution, as a basis for refreshing a witness' recollection, or as prior recollection recorded in a situation where a witness had forgotten certain events but remembered that his statement constituted an accurate account of those events. As matters now stand, it is quite unclear to what extent a defendant is entitled in a federal criminal trial to obtain discovery of pretrial statements by persons who will probably not be called as Government witnesses, perhaps because their pretrial statements contain information helpful to the defense. However, in light of the present uncertainty, a defense attorney would seem well-advised to move at an early stage for an order requiring the Government to inform the defendant of all prospective Government witnesses on the ground that this is necessary if the defendant is to be fully cognizant of the limitations on his discovery rights by virtue of 18 U.S.C. § 3500 (a). If such a motion is denied, the defense counsel would probably then wish to move under both rule 16 and rule 17 for the production of the statements of all named individuals whom the defense has any reason to believe might have knowledge pertaining to the case.[34] (If the Government resists production of such statements on the ground that these persons are prospective Government witnesses within the meaning of the Jencks Act, subsequent failure by the prosecution to call such persons as witnesses at the trial may, under some circumstances, provide a helpful basis for argument by the defense.) The defense counsel should also seek production by the Government of statements by any other individuals whose identity is unknown to the defense, and, in so doing, the defense should advance every argument or theory available to demonstrate that it is engaged in a good faith search for evidence rather than in a "fishing expedition."

After a witness called by the United States has testified on direct examination, the defendant may move under 18 U.S.C. § 3500 (b) to have any statement by the witness produced; in this event the statement is delivered to the trial judge who, after excising those portions which do not relate to the subject matter of the witness' testimony, delivers it to the defendant for his use. The defendant may also

[34] An indigent defendant might not wish to make such a motion because of the requirements imposed upon him by the present wording of rule 17 (b). Furthermore, if the defendant is unsure whether Government investigators have had any contact with a prospective witness, he may be hesitant to request discovery of any statements by that person, since the request might alert the prosecution to a possible source of additional evidence which otherwise might not be known to it.

seek a reasonable recess to examine the statement, and the likelihood that a trial will be interrupted by such recesses requested by defense counsel will undoubtedly prompt the United States attorney, in some cases, to allow pretrial inspection of witnesses' statements.

Recognizing that investigators take statements in many different ways, Congress has defined the term "statement" in 18 U.S.C. § 3500 (e) as

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or
(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

Cases have already reached the Supreme Court with respect to the applicability of this definition to particular fact situations. For example, when has a witness "adopted or approved" a statement which represents a summary of notes taken by the investigator?[35] When is a summary from a stenographic or electrical recording to be considered a "substantially verbatim recital of an oral statement made by said witness to an agent of the Government"?[36] How rapidly must a transcription be made to be deemed "recorded contemporaneously"?[37] Would notes dictated by an FBI agent the

[35] See Campbell v. United States, 373 U.S. 487 (1963), in which the Court finally concluded that an interview report prepared by an FBI special agent had been "adopted" by the witness. Receipts given by witnesses for their expense money were viewed as "statements" under 18 U.S.C. § 3500 (a) in Killian v. United States, 368 U.S. 231, 242 (1961).

[36] In Palermo v. United States, 360 U.S. 343 (1959), the Court held that a 600 word memorandum summarizing parts of a three and one-half hour interrogation of the witness by an investigator did not constitute a witness' statement within the meaning of the Jencks Act. In that same case, the Court also concluded that statements of a Government witness made to an agent of the Government which do not qualify for production under the Jencks Act cannot be produced at all and that when it is uncertain whether production of a particular statement is required by the act, the statement should be submitted to the trial judge for an in camera determination. *Accord,* Rosenberg v. United States, 360 U.S. 367 (1959). Compare Campbell v. United States, *supra* note 35.

[37] Only "a substantially verbatim recital of an oral statement" is required to be "contemporaneous"; this requirement does not apply to written statements. See Clancy v. United States, 365 U.S. 312 (1961). In Campbell v. United States, 373 U.S. 487 (1963), the FBI agent had questioned Staula, a witness to the bank robbery involved, for thirty minutes and had jotted down notes while the witness was answering his questions. Then the agent, using his notes to refresh his recollection, recited orally to Staula the substance of the interview, asked him if the recitation was correct, and received an affirmative answer. Some nine hours later, the agent transcribed the inter-

day after an interview constitute a "statement" for purposes of the Jencks Act?[38]

One other federal statute deserves mention in any discussion of discovery. 18 U.S.C. § 3432 provides:

> A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each venireman and witness.

Since trials for treason and other capital offenses are not commonplace in the federal courts, this statute obviously has limited applicability;[39] moreover, the statute would probably not apply to rebuttal witnesses,[40] so that the prosecution, after establishing a prima facie case, might hold some of its most damaging witnesses undisclosed and surprise the defendant on rebuttal. Furthermore, for a defense counsel to have the names of the witnesses that the Government will call is a far cry from knowing what their testimony will probably be. Although the diligent attorney may seek to interview the prospective Government witnesses in the hope they will give him information, any lawyer realizes that prospective witnesses for the other party, especially if that other party is the Government, frequently will prove reticent when interviewed before

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view report on a dictating machine. After the report had been typed by a secretary from the transcription, the agent checked its accuracy and then destroyed his notes. Compare Ogden v. United States, 303 F.2d 724 (9th Cir. 1962).

[38] If an investigator's notes concerning his interview with a witness are destroyed in good faith and in accord with normal practice, the nonproduction of those notes upon request by the defense after the conclusion of the direct examination will not necessarily require the striking of the witness' testimony or the reversal of a conviction based thereon. See Killian v. United States, 368 U.S. 231 (1961); United States v. Tomaiolo, 317 F.2d 324 (2d Cir. 1963). For a case in which there was an allegation that an investigator had destroyed his notes to avoid their production under the Jencks Act, see United States v. Aviles, 197 F. Supp. 536 (S.D.N.Y. 1961), *aff'd*, 315 F.2d 186 (2d Cir.), *remanded on other grounds sub nom.* Evola v. United States, 375 U.S. 32 (1963).

[39] The circumstance that a statute has been enacted to require that a list of prospective Government witnesses be furnished to the defendant in a capital case would indicate by negative implication that no such requirement exists in noncapital cases, and the federal courts generally have refused to compel the prosecution to furnish such a list in noncapital cases. See United States v. Haug, 21 F.R.D. 22 (N.D. Ohio 1957); United States v. Palermo, 21 F.R.D. 11 (S.D.N.Y. 1957); United States v. Brandt, 139 F. Supp. 367 (N.D. Ohio 1955); United States v. Stein, 18 F.R.D. 17 (S.D.N.Y. 1955). Some jurisdictions require that the names of prospective witnesses be endorsed on the indictment or information. See, *e.g.*, ARIZ. R. CRIM. P. 153.

[40] Goldsby v. United States, 160 U.S. 70 (1895); Gordon v. United States, 289 Fed. 552 (D.C. Cir. 1923).

trial. Law enforcement personnel sometimes appear exceedingly reluctant to converse with a defense attorney, and they may even be prevented from doing so by the policy or directives of their agency.[41] It is not unknown for a prosecuting attorney to suggest to his prospective witnesses that they not talk with anyone about the subject of their prospective testimony and, whether designedly or otherwise, this suggestion frequently discourages communication with a defendant's attorney.[42] Even an explanation by a prosecutor to witnesses that they are under no obligation to talk with anyone about the case may be couched in terms which intimate that they would be well-advised to exercise this option of silence. In light of these circumstances, the discovery furnished under 18 U.S.C. § 3432 in capital cases seems almost trivial when compared with the gravity of the possible punishment for the defendant if convicted.

II

OTHER DISCOVERY PRACTICE

The rules governing discovery in criminal cases in state courts vary markedly from jurisdiction to jurisdiction.[43] In recent years some jurisdictions have witnessed a trend towards greater liberalization of discovery, both through legislation and judicial decision. Thus, some states make express provision for discovery of a defendant's pretrial statements to investigators;[44] others allow discovery

[41] For example, the Air Force's Office of Special Investigations apparently has issued some type of directive under which its agents are severely limited in their freedom to discuss a case with defense counsel. A question might be raised as to whether such a directive impairs the accused's right to counsel and to due process by making it more difficult for the defense counsel to obtain information.

[42] A survey of discovery practice in the District of Columbia reveals that some prosecutors there either discourage witnesses from talking with defense representatives or suggest that any interviews be held in the presence of the United States attorney. One assistant United States attorney apparently tells witnesses not to talk to defense representatives at all. See *Symposium, supra* note 6, at 117. Some question might be raised about the consistency of such practices with the constitutional guarantees of the right to counsel and due process. *Cf.* Brady v. Maryland, 373 U.S. 83 (1963).

[43] For some of the recent articles on this subject, see Bradshaw, *Discovery in Criminal Cases: The Problem in Texas,* 1 HOUSTON L. REV. 158 (1963); Datz, *Discovery in Criminal Procedure,* 16 U. FLA. L. REV. 163 (1963); Garber, *The Growth of Criminal Discovery,* 1 CRIM. L.Q. 3 (1962); Louisell, *supra* note 7; Nedrud, *supra* note 5.

[44] DEL. SUPER. CT. (CRIM.) R. 16; ILL. REV. STAT. ch. 38, § 729 (1934); MD. R. CRIM. P. 728. For decisions allowing discovery of a defendant's statements, see Powell v. Superior Court, 48 Cal. 2d 704, 312 P.2d 698 (1957); State v. Dorsey, 207 La. 928, 22 So. 2d 273 (1945); People v. Johnson, 356 Mich. 619, 97 N.W.2d 739 (1959); State v. Johnson, 28 N.J. 133, 145 A.2d 313 (1958) (although denying inspection of statements

of witnesses' statements in the hands of the prosecution;[45] and in some instances a defendant has succeeded in obtaining access before trial to reports concerning the results of scientific investigations made by experts.[46]

In some states new tools for discovery have been placed in the hands of the prosecution by virtue of statutory requirements that a defendant give notice of his intention to prove alibi[47] or to rely on an insanity defense.[48] Recently the Supreme Court of California, reasoning that pretrial discovery should not be a one-way street, upheld that portion of a trial court's order which required the defendant in a rape case to reveal the names and addresses of witnesses he intended to call and to produce before trial reports and X-rays he intended to introduce in evidence to support his defense of impotence.[49] In support of the result, which was reached without

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by prospective prosecution witnesses); State v. Thompson, 54 Wash. 2d 100, 338 P.2d 319 (1959).

In United States *ex rel.* Butler v. Maroney, 319 F.2d 622 (3d Cir. 1963), a federal court of appeals concluded that the refusal of the prosecutor in a state court trial to let the defendant see his own pretrial statement deprived him of due process under the concepts expressed by the Supreme Court in Brady v. Maryland, 373 U.S. 83 (1963).

[45] People v. Garner, 57 Cal. 2d 135, 367 P.2d 680 (1962) (defendant allowed discovery of codefendant's statements); People v. Chapman, 52 Cal. 2d 95, 338 P.2d 428 (1959); People v. Rosario, 9 N.Y.2d 286, 173 N.E.2d 881, 213 N.Y.S.2d 448 (1961). See also State v. Pacheco, 38 N.J. 120, 183 A.2d 54 (1962), and Commonwealth v. Smith, 412 Pa. 1, 192 A.2d 671 (1963), which approve the principle established in the *Jencks* case that a defendant should have access for impeachment purposes to prior statements by prosecution witnesses. In Powell v. Wiman, 287 F.2d 275 (5th Cir. 1961), the refusal of the prosecution to allow inspection by the defense of a pretrial statement made by a key prosecution witness was one circumstance which led to the holding that a robbery conviction in a state court was lacking in due process.

[46] Norton v. Superior Court, 173 Cal. App. 2d 133, 343 P.2d 139 (1959) (photographs used in identifying the accused); Schindler v. Superior Court, 161 Cal. App. 2d 513, 328 P.2d 68 (1958) (coroner's and pathologist's reports and other scientific reports); Walker v. Superior Court, 155 Cal. App. 2d 134, 317 P.2d 130 (1957) (autopsy report and report from Criminal Bureau of Identification); State *ex rel.* Sadler v. Lackey, 319 P.2d 610 (Okla. Crim. App. 1957) (FBI report concerning certain specimens scraped from defendant's car); DiJoseph Petition, 394 Pa. 19, 145 A.2d 187 (1958); State v. Thompson, 54 Wash. 2d 100, 338 P.2d 319 (1959) (autopsy report and FBI reports on an examination of clothing, personal effects, and blood samples of defendant and of victim).

[47] Notice of alibi is apparently required in Arizona, Indiana, Iowa, Kansas, Michigan, Minnesota, New Jersey, New York, Ohio, Oklahoma, South Dakota, Utah, Vermont, Wisconsin, and Wyoming. See Nedrud, *supra* note 5, at 159.

[48] Notice of an insanity defense is provided for in Arizona, Arkansas, California, Colorado, Florida, Georgia, Indiana, Iowa, Louisiana, Maryland, Michigan, Ohio, South Dakota, and Vermont. See Nedrud, *supra* note 5, at 159.

[49] Jones v. Superior Court, 58 Cal. 2d 56, 372 P.2d 919 (1962). This case is discussed extensively in a Note in 76 HARV. L. REV. 838 (1963), which also describes the various state statutes dealing with alibi and insanity defenses and the policies

the aid of enabling legislation, Justice Traynor, writing for the majority, relied in part on the decisions in other jurisdictions which had upheld the constitutionality of statutes requiring a defendant to give notice of an alibi defense. With respect to the present California situation, several other observations seem relevant: (1) that state, by judicial decision, has probably gone further than any other in providing pretrial discovery for defendants in criminal cases;[50] (2) the development of a strong public defender system there has helped assure that tools of discovery will be used as they become available;[51] (3) as if to offset the procedural advantages available to the defendant, comment may be made on his failure to take the stand,[52] so that there is considerable pressure for him to testify at his trial rather than to remain silent and rely primarily upon the presumption of innocence.

The English courts impose requirements of discovery which are quite beneficial to defendants.[53] At a preliminary hearing, depositions are taken of the various witnesses and reduced to writing. Under most circumstances, a witness cannot be called by the prosecution to testify unless he has given a written deposition prior to trial; therefore, the defendant knows the substance of all the prosecution's expected testimony and can prepare his defense accordingly. The Scottish courts, which draw on a legal tradition somewhat different from that of England, also require that the depositions of prospective prosecution witnesses be reduced to writing and copies thereof furnished to the defense prior to trial in order for them to testify.[54] Neither in Scotland nor England does there appear to be any requirement that the defense be furnished with statements taken

applicable in this field. Apparently the Note writer considers that the discovery order in *Jones* did not deprive the defendant of his constitutional safeguards against self-incrimination, unreasonable search and seizure, and denial of due process. See also People v. Lopez, 384 P.2d 16, 32 Cal. Rptr. 424 (1963), for a more recent treatment of discovery problems by the California Supreme Court.

[50] See the discussion of the California cases in Garber, *supra* note 43, at 18-22; Louisell, *supra* note 7, at 74-86.

[51] The existence in the District of Columbia of the Legal Aid Agency and of the Georgetown Legal Internship Program has probably helped produce a trend in that jurisdiction towards greater liberalization of discovery in behalf of defendants.

[52] Adamson v. California, 332 U.S. 46 (1947).

[53] With respect to the English practice, see DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND (1958); Louisell, *supra* note 7, at 64-67.

[54] The writer's information concerning criminal procedure in Scotland is based on conversations with Professor Paul Hardin of the Duke Law School faculty, who is currently preparing a paper for publication on that subject.

by the police from persons whom the prosecution does not intend to call to testify.

In American courts-martial, under the requirements of the *Manual for Courts-Martial*,[55] the statements of all witnesses are furnished to the accused and his counsel as a matter of course. Generally copies of all statements are made available, without regard to whether a person whose statement is furnished to defense counsel will probably be called as a prosecution witness. Frequently, therefore, a defense counsel will be provided by the prosecution with summaries of testimony to be expected from persons who ultimately will probably testify for the defense rather than for the prosecution.[56]

Although a rather broad discovery procedure exists in other legal systems and appears to operate smoothly there, it should be emphasized that this circumstance does not constitute absolute proof that equally broad discovery should be provided in American state and federal courts. Perhaps in the other legal system, there exist other rules which avoid undue weighting of the scales in favor of the defense. Perhaps also the type of crime which constitutes the largest part of the workload in the other legal system renders it more feasible there to grant an accused a broad right of discovery. For example, the English courts allow extensive comment upon the evidence by the trial judge, including comment upon a defendant's failure to take the stand;[57] and this advantage for the prosecution may help

[55] The MANUAL FOR COURTS-MARTIAL, U.S., 1951, provides that "counsel may properly interview any witness or prospective witness for the opposing side in any case without the consent of opposing counsel or the accused." ¶ 42*c*. Prior to trial the prosecutor, termed in the MANUAL the trial counsel, "should advise the defense of the probable witnesses to be called by the prosecution, and the fact that the defense has not been so advised with respect to a witness who appears at the trial may be a ground for a continuance." *Id.* ¶ 44*h*. Moreover, the trial counsel will "permit the defense to examine from time to time any paper accompanying the charges, including the report of investigation and papers sent with the charges on a rehearing." *Ibid.* The accompanying papers would normally include a signed summary of the testimony expected from each witness or other source. *Id.* ¶¶ 31*b*, 32*f* (4) (a). Frequently a copy of the statements of witnesses will be furnished to the accused and his counsel when the charges are served upon him by the trial counsel.

[56] Occasionally problems will arise concerning information contained in certain investigation reports or concerning evidence of a confidential or secret nature. MANUAL FOR COURTS-MARTIAL, U.S., 1951, ¶ 151*b* (3). In such a case, special application must be made by defense counsel for access to the classified information. *Ibid.* Military law also recognizes the informer's privilege. *Id.* ¶ 151*b* (1).

[57] As noted earlier, California, the state which probably has been the most liberal in granting discovery to defendants, also permits comment on a defendant's failure to take the stand. However, California also allows the defendant's credibility to be im-

offset the discovery provided the defense. Neither English courts nor American courts-martial have heretofore generally been confronted with trials involving organized crime; hence the danger that a defendant who has discovered the names and expected testimony of prosecution witnesses may seek to intimidate them may be considerably less than in many of the cases brought to trial in some state and federal courts. Moreover, in courts-martial a high percentage of cases is tried on the basis of confessions by the accused, and in such instances the availability of discovery for the accused is generally not too great a disadvantage for the prosecution. Also, military authorities are frequently in position to hold witnesses in line for the prosecution against any pressures by the defense to persuade them to change their testimony.[58] In short, any argument for discovery based on its success in other systems should not be accepted uncritically.

III

PROPOSALS FOR CHANGE IN THE FEDERAL RULES OF CRIMINAL PROCEDURE

In December, 1962, the Advisory Committee on Criminal Rules to the Judicial Conference of the United States distributed for comment by the bench and bar a number of proposed amendments to those rules, some of which dealt with discovery. The proposed amendments envisaged a bilateral expansion of discovery, since proposed rule 12A provided that upon proper demand by the Government, a defendant must give notice of alibi, with the sanction that, absent such notice, he would not be permitted to introduce evidence of alibi at the trial other than his own testimony, unless the court for cause ordered otherwise. Moreover, the pretrial conference authorized under proposed rule 17A upon motion of either party or by the court's own motion would in many instances tend in practice to provide discovery for both the prosecution and the defense.

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peached by cross-examination concerning his prior convictions, while such impeachment of a defendant is generally prohibited or very narrowly circumscribed in the English courts.

[58] In fact, military justice is sometimes criticized on the ground that witnesses are subject to some type of inherent coercion, including a coercion not to alter their testimony or to give testimony favorable to the accused.

A proposed revision of rule 16 would permit a defendant to inspect and copy or photograph designated books, papers, documents or tangible objects "which are within the possession, custody, or control of the Government, including written or recorded statements or confessions made by the defendant, and the results or reports of physical examinations and scientific tests, experiments and comparisons." Thus, the currently existing restriction under rule 16 that the books, papers, documents or objects must have been "obtained from or belonging to the defendant, or obtained from others by seizure or by process" would be eliminated. Moreover, for the first time there would be clear authority for a defendant to obtain inspection of his own pretrial statements or confessions, regardless of their form;[59] and also for the first time, the results of scientific tests would be clearly subject to discovery and inspection under rule 16. However, the restrictions imposed upon pretrial discovery and inspection by the Jencks Act would be left unimpaired.

Under the amendments proposed in December, 1962, neither rule 6 (e), dealing with the secrecy of grand jury minutes, nor rule 17, concerning subpoenas, would be altered. However, the need to stretch rule 17 (c) by judicial interpretation to authorize discovery through the issuance of subpoenas for documentary evidence to be produced for inspection before trial would be minimized by the expansion of rule 16.[60]

Broadening of discovery was also suggested with respect to the report of presentence investigation which is provided for under rule 32 (c). Currently this rule makes no express provision for discovery by the defendant of the contents of this report before imposition of the sentence, and the federal courts have generally not viewed the report as being subject to discovery,[61] apparently on the premise that the report, in order to be helpful to the sentencing

[59] Some authority for this position might arguably be inferred on the basis of a negative implication in the wording of the Jencks Act, 71 Stat. 595 (1957), 18 U.S.C. § 3500 (a) (1958).

[60] For an example of such stretching, see Fryer v. United States, 207 F.2d 134 (D.C. Cir.), *cert. denied,* 346 U.S. 885 (1953), holding that it was error to deny pretrial inspection under rule 17 (c) with respect to defendant's pretrial statement.

[61] See, *e.g.,* United States v. Durham, 181 F. Supp. 503 (D.D.C.), *cert. denied,* 364 U.S. 854 (1960). *But cf.* Smith v. United States, 223 F.2d 750 (5th Cir. 1955). There is no constitutional right to disclosure. Williams v. New York, 337 U.S. 241 (1949).

judge, must contain a substantial amount of information obtainable only in the expectation that it will be kept in confidence. The amendment proposed in December, 1962, would provide:

> Upon request of the defendant the court before imposing sentence shall disclose to the defendant or his counsel a summary of the material contained in the report of the presentence investigation and afford an opportunity to the defendant or his counsel to comment thereon. The sources of confidential information need not, however, be disclosed.

Under this proposal the defendant would receive a more meaningful opportunity to rebut derogatory information pertinent to sentencing, an opportunity which, incidentally, has been zealously assured for the accused in American military justice.[62]

Various criticisms were offered with respect to the proposed amendments. It was contended that the proposed revisions still left the defendant's right of discovery too unclear or too restricted. For example, under the amendments proposed in December, 1962, would a defendant be entitled to inspect the statements of a codefendant? Or to examine a copy of any testimony which he had himself given before a grand jury? Or the criminal record of a prospective Government witness? Other critics of these proposals questioned the desirability of requiring a notice of alibi and contended that regardless of state court decisions upholding statutes which require it, such a notice invaded the fifth amendment privilege against self-incrimination and was fundamentally unfair to defendants. At the same time they contended that the existing discovery in favor of the prosecution which results from the showing required of an indigent defendant under rule 17 (b) as a prerequisite to his obtaining a subpoena for the presence of a desired witness produces an unwarranted—and perhaps unconstitutional—discrimination against the poor.

In March, 1964, a second preliminary draft of proposed amendments to the Federal Rules of Criminal Procedure was released for comment and suggestions. Once again many of the proposals have relevance to discovery, although in some instances this relevance may not be immediately apparent. For example, proposed amendments to rules 5 (b) and 44 make it clear that an indigent defendant is entitled to have counsel assigned to represent him at every stage

[62] See United States v. Lanford, 6 U.S.C.M.A. 371, 20 C.M.R. 87 (1955); EVERETT, MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES 267-68 (1956).

of the proceedings "from his initial appearance before the commissioner or the court"; the availability of counsel to him at the time of the preliminary examination before the commissoner provided for under rule 5 (c) will enhance for the indigent defendant the value of this commissioner's hearing as an instrument of discovery. Proposed rules 46 and 46.1, which concern release on bail or without bail, will make it easier for a defendant to be released from pretrial confinement. The resultant increased likelihood that the defendant will be available to assist in preparing his defense will reduce the frequency of the situation where defense counsel are not able to obtain discovery of the prosecution's case while their clients, by reason of confinement, are unavailable to aid in preparing the defense. For this reason, the proposals dealing with release before trial might be said to lessen somewhat the need for broadened discovery, and, of course, the greater probability that the defendant will not be in jail before trial may involve a concomitant risk that he may take advantage of his freedom to intimidate or tamper with witnesses.

Under the March, 1964, proposals, rule 7, which concerns the indictment and the information, would be modified to encourage greater willingness in the federal courts to grant a bill of particulars. Accordingly, rule 7 (f), authorizing the bill of particulars, might become a more significant instrument than heretofore for obtaining discovery. The requirement of a notice of alibi, which was contained in the December, 1962, proposed amendments, is discarded in favor of a proposed rule 12.1 providing that "if the defendant intends to rely on the defense of insanity at the time of the alleged crime, he shall, not less than 5 days before the date set for trial, serve upon the government notice of such intention." As noted earlier, there is considerable precedent in state statutes for requiring a defendant to give notice of his intention to rely on an insanity defense.

When the proposal was made in December, 1962, that a notice of alibi be required, some fears were expressed that the intensive investigation by the Government which would probably follow upon such a notice might discourage prospective alibi witnesses from testifying or from volunteering information to a defendant or his attorney in the first instance, and thereby might injure the defendant who had a legitimate alibi defense. It does not seem likely that any

similar consequences would follow the notice of insanity required under rule 12.1; probably any Government investigation which might follow upon such a notice would have no effect on the availability to the defendant at trial of the evidence on which he would rely. The information required from the defendant in a notice of alibi—namely, the place where he was at the time in question—seems much more specific in nature than that to be contained in the general notice provided for under proposed rule 12.1, and the latter would thus appear to present less of a threat to the defendant's privilege against self-incrimination.

The Advisory Committee's Note to proposed rule 12.1 also points out that in *Lynch v. Overholser*,[63] the Supreme Court ruled that a defendant had a right to determine whether to raise the issue of insanity and that the required notice of insanity would preclude any problem of deciding whether the defendant relied on insanity. While this is true, the same problem would be as easily eliminated by a procedure for the defendant to plead insanity at the trial or to make some statement then that he intended to rely on an insanity defense, rather than by requiring notice of an insanity defense at least five days before trial. The real justification for such notice does not lie in dispelling uncertainty as to whether the defendant relies on insanity but in providing the Government with suitable opportunity to prepare to meet the issue.

Under the amendments proposed in March, 1964, the following sentence would be added to rule 14, which concerns relief from prejudicial joinder:

> In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

Under this proposal, the in camera inspection now utilized in determining whether a statement is subject to inspection under the Jencks Act would be used by the district judge in deciding whether to grant a motion for severance.[64]

A confession offered in evidence against one defendant cannot be considered against his codefendant, and limiting instructions are

[63] 369 U.S. 705 (1962).

[64] See Palermo v. United States, 360 U.S. 343, 354 (1959) (procedure for in camera inspection).

normally given to this effect. However, such instructions seldom erase the effect of the codefendant's confession;[65] and where a defendant anticipates that the confession of a codefendant may be offered, he will probably consider favorably a motion for severance to avoid this possible source of prejudice. Heretofore the unavailability of any clear right to discovery of the codefendant's statement sometimes has made it difficult to substantiate the basis for the motion; and if the issue was raised again at the trial, as by a motion for a mistrial after the codefendant's confession had been received in evidence, the defendant then was confronted with the reluctance of a trial judge to grant such relief at that stage in the proceedings.

The proposed addition to rule 14 provides significant assistance to the defendant in coping with this problem, since the judge ruling on the motion for severance is more clearly apprised at that time of the possibility of prejudice at the trial through the admission in evidence of the codefendant's confession. However, it is important to remember that under this proposal by the Advisory Committee, the defendant still does not receive inspection of the codefendant's statement. Indeed, the fact that rule 14 would now deal specifically with the statement of a codefendant might make it more difficult to argue that such a statement would be subject to discovery and inspection under rule 16, even in the form that rule would take under the proposed amendments.

Moreover, insofar as rule 14 is concerued, the defendant will have to make his motion for severance before knowing what is in his codefendant's statements to investigators or, in some instances, whether any statements at all were made by the codefendant. Under these circumstances, it may be difficult for a defendant to argue that he is prejudiced by the contents of a codefendant's statements, since he does not know the contents of the statements; and in this regard, he must rely considerably on the fairness and perspicacity of the judge hearing the motion for severance.

The defendant does not receive a copy of the codefendant's statements to use for impeachment purposes if that codefendant enters a plea and testifies for the Government; however, under the Jencks Act he could insist upon receiving a copy of the statements at the

[65] Prosecutors are sometimes accused of favoring joint trials where there is a confession by only one defendant in the hope that this confession will be given weight by the jury against the other defendants.

conclusion of the direct examination of the codefendant. If, however, that codefendant takes the stand in his own defense and gives damaging testimony, the defendant would not qualify for relief under the Jencks Act and yet might still not be clearly entitled to discovery of the codefendant's pretrial statements. Of course, if there is no inconsistency between positions to be taken by several defendants and their respective counsel are cooperating in preparing the defense, then each defendant can obtain a copy of his own statements—this would be clearly authorized under proposed changes in rule 16 and may already be implied in the wording of 18 U.S.C. § 3500 (a)—and he can then exchange copies with his codefendants.

Currently rule 15, which deals with depositions, only authorizes the taking of depositions upon motion of a defendant; however, the taking of such depositions is not allowed solely for discovery purposes. Instead it is dependent upon the materiality of the witness' testimony, his probable inability to attend the trial, and the necessity to take the deposition in order to prevent a failure of justice. Under the March, 1964, proposals, rule 15 would be amended to allow the taking of a deposition at the instance not only of the defendant but also of the Government or the witness. However, the limitations upon the taking of depositions remain such that depositions could not become instruments of discovery by the prosecution. Proposed rule 15 (g) would make it clear that if the witness' deposition is taken at the instance of the Government or the witness, the same obligation will exist to furnish the defendant with copies of the witness' pretrial statements that would exist under the Jencks Act if the witness were testifying at the trial.[66]

The March, 1964, proposals envisage a far more sweeping revision of rule 16, which governs discovery and inspection, than was proposed in the December, 1962, amendments. As was the case in the earlier proposed amendment, the requirement that the defendant can discover only items "obtained from or belonging to the defendant or obtained from others by seizure or process" would be deleted; the source of the documents to be discovered would become unimportant. Furthermore, the defendant would be specifically authorized to inspect any written or recorded statements or con-

[66] If the Government fears that some effort will be made to eliminate a witness whose identity and expected testimony it has been compelled to disclose, then it might wish to take his deposition pursuant to rule 15 as amended.

fessions which he himself had made, as well as any recorded testimony he had given before a grand jury. Results of physical and mental examinations and of scientific tests or experiments[67] made in connection with the particular case "which are known by the attorney for the government to be within the possession, custody or control of the government" would also be subject to discovery.

Under the proposal of December, 1962, the discovery of the defendant's pretrial statements and the results of physical examinations and scientific tests, experiments, and comparisons would require "a showing that the items sought may be material to the preparation of his defense and that the request is reasonable." However, under the March, 1964, proposal, the defendant would apparently be entitled automatically to inspect and copy his own pretrial statements in whatever form, any recorded testimony he had given before a grand jury, and the results of any physical or mental examinations and any scientific tests or experiments made in connection with the particular case; reasonableness and materiality of the request would be conclusively presumed.

The defendant would also have a right to inspect and copy or photograph other "books, papers, documents or tangible objects . . . within the possession, custody or control of the government"; but as to these items, he would be required to show materiality to the preparation of his defense and the reasonableness of his request. Furthermore, there would be excepted from discovery any reports, memoranda, or other internal Government documents made by Government witnesses covered by the Jencks Act.

Because of the possibility that discovery might be abused—for instance, by an attempt to tamper with or eliminate the witness—the proposed amendment to rule 16 would authorize protective orders which might deny, restrict, or defer discovery or inspection. Likewise, a procedure is authorized for the Government to make a showing of the necessity for a protective order by means "of a written statement to be inspected by the court in camera." If relief is granted to the Government, then the text of the Government's statement would be sealed and preserved for review by the appellate court in the event of an appeal.

It was pointed out earlier that the December, 1962, proposed

[67] According to the Advisory Committee's Note, this right of discovery would include fingerprint and handwriting comparisons.

amendments embodied a bilateral expansion of discovery in the form of the notice of alibi requirement and the pretrial procedure. The March, 1964, proposal for amendment of rule 16 carries this bilateral expansion much further; proposed rule 16 (c) specifically authorizes discovery by the Government in these terms:

If the court grants relief sought by the defendant under this rule, it may condition its order by requiring that the defendant permit the government to inspect, copy or photograph statements, scientific or medical reports, books, papers, documents or tangible objects, which the defendant intends to produce at the trial and which are within his possession, custody or control.

Interestingly, the Advisory Committee's Note to rule 16 (c) comments:

The question whether this subdivision should go further and permit limited discovery by the government independently of discovery sought by the defendant has been considered by the Advisory Committee. A draft which would accomplish this is presented here as an alternative to be commented on as an aid to the Committee in future deliberations on the subject.

Alternative Subd. (c). Discovery by the Government. On motion of the Government, the court may order the defendant to permit the Government to inspect, copy or photograph statements, scientific or medical reports, books, papers, documents or tangible objects, which the defendant intends to produce at the trial and which are within his possession, custody or control.

Naturally these proposals raise some questions of constitutionality, especially in terms of the privilege against self-incrimination. With respect to the proposal which conditions the Government's right to discovery on the defendant's having sought relief under rule 16, it might be argued that by his own request for discovery, the defendant has waived his right to object on constitutional grounds to the discovery by the Government of the documents or objects in his own possession. However, at least one recent Supreme Court case seems subject to the inference that, on due process grounds, a defendant under some circumstances would have a right to discovery of evidence in the Government's possession.[68] Yet under the wording proposed for rule 16 (c), even the request for the discovery of information to which the defendant would be entitled on constitutional grounds might be deemed a waiver of his right to resist dis-

[68] See Brady v. Maryland, 373 U.S. 83 (1963).

covery by the Government. The manner in which the Government's right to discovery might become a weapon against the defendant's own right to discovery makes this proposal by the Advisory Committee seem objectionable.

Whether the Government's right to discovery is stated in conditional or absolute terms under the proposed revision of rule 16, its desirability bears close scrutiny. After all, the Government does obtain considerable discovery of the defendant's case through the efforts of investigative agencies and the testimony taken by the grand jury. In addition, the record keeping and reporting requirements which have proliferated in American life as a result of governmental regulation are a fertile source of information for use by the prosecution. Furthermore, the threat of a perjury prosecution is probably much more of a deterrent to the giving of false testimony by defense witnesses than by Government witnesses.

Under either alternative proposed by the Advisory Committee, a defendant would be subject to discovery of items which he "intends to produce at the trial and which are within his possession, custody or control," apparently on penalty of their inadmissibility at the trial. When a defendant is called upon to indicate before trial which items of evidence he will offer at the trial, there would seem to be serious questions of self-incrimination, unreasonable search and seizure, and denial of due process, for he is being coerced into furnishing information which may be used against him. In this connection it should be noted that proposed rule 16 (c) would provide no assurance to the defendant that, in establishing its own case, the Government might not use against him the evidence which it had discovered. His dilemma might be one of determining whether to run the risk of providing the Government with evidence which would cure a deficiency in its case or being precluded from presenting this same evidence if it were not presented by the Government and became important in connection with his own defense. In many instances it may be almost impossible before trial to be sure that some document or object will not be used at the trial, if only as rebuttal evidence, and undoubtedly questions would arise at trial as to whether a defendant had previously intended to produce at the trial some document which he had not furnished to the Government for inspection. In short, if the discovery by the Government which would be authorized by proposed rule 16 (c)

proved constitutional, it might nonetheless prove difficult to administer.

Proposed rule 16 (g) imposes a continuing duty to disclose. If a party discovers, after compliance with a discovery order and prior to or during trial, that it possesses additional material previously requested which is subject to discovery or inspection under rule 16, it must notify the other party of the existence of this material; and the court may grant appropriate relief.[69] This continuing duty would rest upon the defendant as well as the Government, to the extent that a right of discovery by the Government is authorized. Since a partial disclosure may sometimes be positively misleading,[70] the imposition of this continuing duty seems highly appropriate.

The March, 1964, proposed amendments would relax the requirements for issuance of a subpoena at the request of an indigent defendant (who under the amendment would be termed a defendant "unable to pay.") No longer would the situation exist in which the indigent is required to disclose in advance his theory of defense in order to obtain the issuance of a subpoena at Government expense, while more wealthy defendants can avoid such disclosure simply by having the subpoenas issued in blank. Thus one other disadvantage attributable to poverty would be mitigated.

Rule 17.1, proposed by the Advisory Committee in March, 1964, and entitled "Pretrial Procedure," corresponds closely with rule 17A, proposed in December, 1962. However, for reasons not disclosed, there is deleted from the later proposal the earlier wording that "no admission of guilt at the conference shall bind the defendant or be admissible in evidence."[71] In any event, the specific authority for pretrial conferences, which are now already being used to some extent even in the absence of a rule,[72] should induce informal

[69] Since proposed rule 16 (g) imposes a continuing duty, the defendant would presumably be subject to a duty to disclose any change in intention as a result of which he intended to produce at the trial other documents or objects than those which had previously been discovered by the Government.

[70] See, *e.g.*, Brady v. Maryland, 373 U.S. 83 (1963).

[71] Perhaps it is now intended that certain admissions of guilt will be binding; perhaps the deletion of this sentence was intended to conform to a change in the proposed wording under which the "counsel for all parties," rather than the parties themselves, are ordered to appear for the pretrial conference.

[72] See Brewster, *Criminal Pre-Trial—Useful Techniques*, 29 F.R.D. 442 (1962); Estes, *Pre-Trial Conferences in Criminal Cases*, 23 F.R.D. 560 (1959); Kaufman, *Pre-Trial in Criminal Cases*, 23 F.R.D. 551 (1959).

reciprocal discovery. Interestingly, legislation has been proposed to authorize pretrial conferences in courts-martial.[73]

With respect to presentence investigation reports, the Advisory Committee proposed in December, 1962, that a defendant or his counsel should receive "a summary of the material contained in the report of the presentence investigation." In March, 1964, the proposed right of discovery was broadened by a proposed amendment to rule 32 (c) to provide that

> If the defendant is represented by counsel and so requests, the court before imposing sentence shall permit counsel for the defendant to read the report of the presentence investigation (from which the sources of confidential information may be excluded) and shall afford such counsel an opportunity to comment thereon. If the defendant is not represented by counsel and so requests, the court shall communicate, or have communicated, to the defendant the essential facts in the report of the presentence investigation (from which communication the sources of confidential information may be excluded) and shall afford the defendant an opportunity to comment thereon. Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government.

The Committee's Note points out that in England and California the defendant receives a copy of the report in every case; in Alabama he has a right to inspect the report; in Ohio and Virginia the probation officer reports in open court and may be examined by the defendant on his report; and in Minnesota a presentence report is open for inspection by the prosecuting attorney and the defendant's attorney.[74] "Practice in the federal courts is mixed, with a substantial minority of judges permitting disclosure while most deny it."[75]

A few conclusions can be ventured by the writer with respect to the proposals of the Advisory Committee. In the first place, it is highly desirable to allow a defendant to have the opportunity to inspect his own pretrial statements and confessions to the police, in whatever form they may have been made. There is very little opportunity for tampering with witnesses to keep out such evidence, and therefore at least one of the traditional objections to liberalized

[73] See S. 2008, 88th Cong., 1st Sess. (1963), introduced by Sen. Ervin (N.C.) and others.

[74] The Advisory Committee's Note to this proposed amendment contains relevant citations.

[75] *Ibid.*

discovery misses its mark in this situation. While a defendant may perjure himself concerning the circumstances under which a pretrial statement was given in order to dispute its voluntariness and its admissibility, he is probably almost equally prone to do this whether or not he knows beforehand the specific contents of the pretrial statement. In some instances, knowledge that the accused has made an incriminating pretrial statement will lead his counsel to tender a plea of guilty, although it must be conceded that frequently a prosecutor, to induce a guilty plea, will be quite willing to apprise a defense counsel before trial of the existence and even the details of a pretrial statement if it is really incriminating. From the standpoint of a counsel appointed to represent an indigent and often illiterate defendant, it is almost impossible in many instances to provide effective representation without knowledge before trial of the details of statements made by the defendant to police officers after he was first taken into custody—statements which sometimes will point the way to some type of defense or mitigation, such as insanity, self-defense, drunkenness negating specific intent, or "heat of passion." Any harm which might derive from allowing discovery of pretrial statements seems infinitesimal in comparison with the good to be achieved therefrom in preventing an unjust conviction.

The same reasoning would apply with respect to the testimony given by the defendant before the grand jury. There he is at a considerable disadvantage, without the aid of counsel, subject to skillful interrogation, and chargeable with perjury for any false testimony. In fairness, the defendant's counsel should be furnished the opportunity before trial to know what his client told the grand jury.

If the Government has chosen to proceed against two persons under the same indictment and to bring them to trial together as codefendants, then it would seem that neither should be considered a "prospective Government witness" as to the other, and their pretrial statements should not be given the immunity from pretrial discovery which is provided under the Jencks Act.[76] Certainly the pretrial statements of a person whose connection with the alleged offense is so intimate that he has been named a codefendant would seem to be quite material to the preparation of a defense, and a

[76] 71 Stat. 595 (1957), 18 U.S.C. § 3500 (1958).

request therefor would appear eminently reasonable. Under the March, 1964, proposals, the provision for in camera inspection of such statements by the court pursuant to rule 14 in ruling on motions for severance might tend to discourage a court's granting outright discovery of these statements under rule 16. It would seem more appropriate simply to authorize the discovery and inspection of a codefendant's pretrial statements, including his grand jury testimony, and then to allow a defendant to make his motion for severance on the basis of the contents of the pretrial statement. Of course, in this situation, just as in connection with discovery of a defendant's own pretrial statements, the opportunity for tampering with the evidence which the defendant has discovered is rather limited.

The results of scientific tests—fingerprint and handwriting comparisons, ballistics tests, blood analyses, and the like—may loom so large in determining guilt or innocence that a defendant might cheerfully trade a competent lawyer for a helpful expert. However, an indigent defendant—or even a moderately well-heeled one—often cannot afford to pay for the services of a needed expert. Indeed, the failure to make available to the defense counsel necessary ancillary investigative facilities, including qualified experts to make scientific tests, is one of the gaps in many assigued counsel or defender systems for providing representation for the indigent defendant in criminal cases. A broad right of discovery with respect to the results of scientific tests performed by or for Government investigators would help mitigate the effects of this failure. Here again the opportunity for an accused to suppress or tamper with the evidence against him is inherently very limited by reason of the character of the evidence involved, and the pretrial accessibility to the defendant of information about the results of scientific tests does not tilt the scales of justice unduly in his favor. In some instances, as with fingerprint comparisons, an independent expert might find it impossible to reach any meaningful conclusion without access to the extensive records in the hands of the Government. Thus, every argument seems to favor the broad discovery of scientific test results proposed by the Advisory Committee.

Under the wording of both the December, 1962, and the March, 1964, proposals for revision of rule 16, it would seem unclear whether the previous conviction records of prospective witnesses, either Government or defense witnesses, would be documents subject

to discovery and inspection. Certainly the documents containing those records are "within the possession, custody or control of the government,"—namely, the Federal Bureau of Investigation—and they are not "statements" subject to the Jencks Act in the case of Government witnesses. Previous convictions are a recognized method of impeaching witnesses,[77] and thus information with respect thereto would seem "material to the preparation" of the defense. In light of the ease with which the FBI provides such records at the request of federal or state authorities, a request for them would seem quite "reasonable" within the meaning of rule 16 in its present form or as it would be revised by the Advisory Committee. While it may be doubtful that the Advisory Committee really intended to make the arrest and conviction records of prospective witnesses subject to discovery under rule 16, it would not be amiss clearly to authorize some right of discovery of prior convictions, at least with respect to prospective Government witnesses.[78]

In this connection it should be reemphasized that cross-examination of a witness is permitted with respect to some of his previous convictions.[79] If a defense witness falsely denies the existence of a criminal record, the prosecutor will usually be able to question him in detail on the basis of the arrest and conviction record furnished by the FBI; and if the witness continues to deny the prior convictions, a prosecution for perjury might later be undertaken, if the falsity is deemed sufficiently material to justify such action. But what if a Government witness falsely denies the existence of a criminal record? A conscientious prosecutor who is aware from records in his possession that the witness is testifying falsely would seem to be under an obligation, as an officer of the court, to bring the deception to the attention of the trial judge and of the defense counsel, but, of course, one can only conjecture whether this obligation would be fulfilled. Furthermore, the prosecutor may not have the witness' conviction record at hand; and in this event, the false testimony will go undetected. In light of the defense counsel's right to cross-examine Government witnesses about previous convictions, why should the defense be precluded from obtaining such information until the

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[77] 3 WIGMORE § 980.

[78] There is probably not too much occasion for concern in behalf of a defendant or defense counsel whose own witnesses misinform him before trial about their criminal records.

[79] 3 WIGMORE § 980.

time of trial—and then subject to the witness' truthfulness upon cross-examination? The primary effect produced by the present system is that some Government witnesses will successfully conceal a past criminal record, either because the prosecution fails to recognize the falsification or fails in its duty to inform the court of the deceit practiced by the witness.

What undue advantage would pretrial discovery of a witness' criminal record provide to the defense? How would it tend to induce perjury or the suppression of evidence—or any of the other evils which it is sometimes claimed follow in the wake of discovery? Accordingly, unless in some way it can be assured that any false replies to cross-examination at the trial concerning prior convictions will be readily detected and brought at the time to the attention of the court and of defense counsel, pretrial discovery concerning the conviction record of Government witnesses should be authorized. In the alternative a procedure similar to that of the Jencks Act might be devised under which after a Government witness testified on direct examination, a defense counsel could obtain information as to any prior convictions which would be a proper subject of cross-examination for impeachment purposes. Of course, there would probably be no occasion in most instances to grant discovery concerning arrests or indictments, which generally are held inadmissible for impeachment purposes,[80] or with respect to convictions which, under the applicable rules of evidence, could not be used for impeachment.

Some misgivings have already been expressed in this article with respect to the effort to provide a bilateral expansion of discovery by giving the Government either a conditional or an absolute right to copy and inspect documents which the defendant intends to produce at the trial. Similar questions can be raised about the constitutionality or desirability of the notice of alibi which would have been required under the December, 1962, proposal by the Advisory Committee. On the other hand, the notice of intent to rely upon insanity does not seem objectionable and at the very least is preferable to the notice of alibi. The diminution of the opportunity for the Government to utilize rule 17 (b), dealing with the issuance of subpoenas at the request of an indigent defendant, as

[80] *Id.* § 980a.

a means for discovery against a defendant helps remove a source of economic discrimination present in the current federal rules.

With respect to discovery concerning the contents of the report of presentence investigation, the March, 1964, proposal by the Advisory Committee goes further than that of December, 1962; and either proposal represents an improvement of the present wording, which apparently leaves the matter of discovery in the discretion of the sentencing judge. Under these proposals, specific provision is made for excluding from the scope of discovery "the sources of confidential information"; therefore, a judge can use his discretion to avoid any disclosures which might threaten future accessibility of information to the Government. Yet, at the same time, the defendant is provided with an opportunity to correct erroneous derogatory information which might lead to an unduly severe sentence.

Suggestions will undoubtedly now be heard that the Advisory Committee should have gone further in providing absolute and unconditional rights of discovery in behalf of defendants, that the Jencks Act should have been overhauled or repealed entirely, and that 18 U.S.C. § 3432 should have been broadened to require that a defendant be furnished with a list of prospective Government witnesses not only in capital cases but also in all cases, or at least in all felony cases. In connection with the failure to suggest more sweeping changes, it should be noted that, as will be discussed next, the courts have been developing a new safeguard for defendants through requirements that the prosecution act to protect a defendant from the unjust consequences of the circumstance that only limited information is available to him.

IV

New Responsibilities for the Prosecutor

In many fields acceptance is being gained for the view that the Government should not take advantage of a citizen's ignorance of material facts in its dealings with him. For example, the Court of Claims has recently recognized a duty on the part of federal officials to disclose to contractors information in their possession which would not be available to a contractor but might increase materially

his bid on a proposed contract.[81] At least one governmental agency, the Urban Renewal Administration, now takes the position that in negotiating for the purchase of property from a private landowner, no offer should be made to him below the figure of the lowest appraisal in the Government's hand.[82] In short, this agency does not wish to profit by the landowner's ignorance of the true value of his own property.

Similarly, it has been recognized for many years that the Government, through its agent, the prosecutor, owes some responsibility to the citizen who faces it as a defendant in the criminal courts. The Supreme Court explained many years ago in *Berger v. United States*[83] that a prosecutor

> may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

In military justice the prosecutor was at one time subject to a theoretical responsibility to a defendant which would be almost impossible to perform; as "judge advocate" of a court-martial, he was supposed not only to prosecute but also to perform judicial responsibilities and at the same time to assure that the interests of the accused were protected.[84] This somewhat unrealistic combina-

[81] See Helene Curtis Indus., Inc. v. United States, 312 F.2d 774, 778 (Ct. Cl. 1963), where, in holding that the Government had failed in its obligation to make proper disclosure to the contractor, the court commented: "In this situation the Government, possessing vital information which it was aware the bidders needed but would not have, could not properly let them flounder on their own. Although it is not a fiduciary toward its contractors, the Government—where the balance of knowledge is so clearly on its side—can no more betray a contractor into a ruinous course of action by silence than by the written or spoken word."

[82] 1 HHFA URBAN RENEWAL MANUAL 1342 (1962).

[83] 295 U.S. 78, 88 (1935). This case was relied on by the majority in Griffin v. United States, 183 F.2d 990, 993 (D.C. Cir. 1950), where the court ruled that the prosecutor should have revealed to the defense, in a first degree mnrder trial in which there was a claim of self-defense, that a morgue attendant had found an open knife in the victim's pocket. According to the court, "the case emphasizes the necessity of disclosure by the prosecution of evidence that may reasonably be considered admissible and useful to the defense. When there is substantial room for doubt, the prosecution is not to decide for the court what is admissible or for the defense what is useful." *Ibid.*

[84] WINTHROP, MILITARY LAW AND PRECEDENTS 193 (2d ed. 1920 reprint) points out that in addition to his duties as prosecutor, the judge advocate has a duty as a minister of justice. Accordingly, Colonel Winthrop apparently considered that he should introduce all the witnesses present at the commission of the act charged or cognizant of the same, instead of selecting only those witnesses whose testimony would tend to

tion of functions still persists in the summary court-martial, where a single officer serves as prosecutor, defense counsel, judge, and jury.[85]

In *Mooney v. Holohan*[86] the Supreme Court established that a criminal conviction violated due process under the fourteenth amendment if it was procured by state prosecuting authorities through the use of perjured testimony known by them to be perjured and knowingly used by them in order to obtain the conviction. The scope of this concept was somewhat broadened in *Alcorta v. Texas,*[87] where a defendant was appealing from a conviction for the murder of his wife, for which he had been sentenced to death. At his trial he testified that he had slain his wife in "sudden passion" after seeing her kissing a man named Castilleja late at night in a parked car; this evidence, if believed, would have reduced the crime to a lower degree of homicide. However, Castilleja, the only eyewitness to the killing, testified for the state, in response to questions from the prosecutor, that he had simply driven the deceased home from work a few times and had had nothing more than a casual friendship with her. Subsequent to Alcorta's conviction, Castilleja admitted that he had had sexual intercourse with Alcorta's wife on several occasions shortly before her death, that he had informed the prosecutor of this before trial, and that he had been told not to volunteer

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convict. *Ibid.* Moreover, the judge advocate was bound to furnish to the court-martial his opinion on any question of law, practice, or procedure arising in the course of the trial. *Id.* at 194. After pointing out that article of war 90 required that after the prisoner had made his plea, the judge advocate should "so far consider himself counsel for the prisoner as to object to any leading question to any of the witnesses, and to any question to the prisoner the answer to which might tend to incriminate himself," Winthrop discusses the duty of the judge advocate as counsel or adviser of the accused. *Id.* at 196-99. These duties were especially broad in scope where the accused was ignorant and without capable counsel. *Id.* at 198-99.

[85] UNIFORM CODE OF MILITARY JUSTICE, arts. 16, 20, 70A Stat. 42, 43 (1956), 10 U.S.C. §§ 816, 820 (1958).

[86] 294 U.S. 103 (1935). See also Pyle v. Kansas, 317 U.S. 213 (1942).

[87] 355 U.S. 28 (1957). For another Texas capital case where the conviction was set aside, see Ashley v. Texas, 319 F.2d 80 (5th Cir.), *cert. denied,* 375 U.S. 931 (1963). There the district attorney had failed to disclose to defendants' counsel the fact, known to him, that a psychiatrist and psychologist engaged by the state had given an opinion that the two defendants were "legally incompetent." Even though the undisclosed evidence was only opinion, the fact that such an opinion had been formed by such an obviously objective witness as one engaged by the prosecution to make the mental examination would have been helpful to the defendants and should have been revealed. The majority of the court of appeals relied heavily on United States v. Dye, 221 F.2d 763 (3d Cir. 1955), where a conviction of murder was reversed because the prosecutor failed to reveal to the defense that a police officer had reported that the accused had been under the influence of alcohol. The prosecution had called another police officer who had testified that the accused was sober and did not appear to have been drunk.

any information about the intercourse but to answer truthfully if specifically asked about it. The prosecutor subsequently conceded that these statements by Castilleja were true, that he had not told the defendant about Castilleja's intercourse with Alcorta's wife, and, that instead of including this information in a written statement taken from Castilleja prior to trial, he had noted it in a separate record. The Supreme Court in a per curiam opinion reversed the conviction on the ground that the defendant had been denied due process.

In *Napue v. Illinois*[88] the defendant had been convicted of murder after a trial in which the principal state witness, then serving a 199 year sentence for the same murder, testified in response to a question by the assistant state's attorney that he had received no promise of special consideration in return for his testimony. The assistant state's attorney had in fact made such a promise, but he did nothing to correct the false testimony. This failure of the prosecutor, according to the Supreme Court, deprived the defendant of due process in violation of the fourteenth amendment. In the Court's eyes, it made no difference that the false testimony pertained only to credibility or that the witness had testified that some lawyer from the office of the public defender had said he was going to try to do something to get the witness' sentence reduced. The conviction must fall, declared a unanimous Court, "when the State, although not soliciting false evidence, allows it to go uncorrected when it appears."[89]

A year ago, in *Brady v. Maryland*,[90] the Supreme Court went much further than in previous cases. There Brady and a companion, Boblit, after separate trials, were convicted of murder in the first degree and sentenced to death. At his trial, Brady had taken the stand and had admitted his participation in the crime, but he had claimed that Boblit had done the actual killing. Apparently, on this basis, Brady's counsel, while conceding in the summation to the jury that Brady was guilty of murder in the first degree, had asked that the jury return a verdict "without capital punishment." Prior to the trial, petitioner's counsel had requested that the prosecution

[88] 360 U.S. 264 (1959). In People v. Savvides, 1 N.Y.2d 554, 136 N.E.2d 853, 154 N.Y.S.2d 885 (1956), it was held reversible error for the prosecution to fail to reveal that a prosecution witness had lied when he testified that he had not been assured leniency in return for testifying.

[89] 360 U.S. at 269.

[90] 373 U.S. 83 (1963).

let him examine Boblit's extrajudicial statements. Several of these had been shown to him; but one dated July 9, 1958, in which Boblit had admitted the actual homicide, was withheld and did not come to the attention of Brady's counsel until after his client had been tried, convicted, and sentenced and after his conviction had been affirmed. Subsequently, Brady moved in the trial court for a new trial based on the newly discovered evidence. The petition for post-conviction relief was dismissed by the trial court, but the Maryland Court of Appeals held that the suppression of the evidence by the prosecution denied petitioner due process of law and remanded the case for retrial on the question of punishment, not the question of guilt. The Supreme Court affirmed this action, agreeing with the Court of Appeals that "suppression of this confession was a violation of the Due Process Clause of the Fourteenth Amendment."[91]

On its facts the *Brady* case would not seem particularly significant, since delivery of some of Boblit's pretrial statements without any mention of the really significant confession could be construed as a sort of misrepresentation by the prosecution. However, after reiterating that it is a violation of due process "when the State, although not soliciting false evidence, allows it to go uncorrected when it appears,"[92] the Court added:

> We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. . . . A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not "the result of guile," to use the words of the Court of Appeals.[93]

Since the Supreme Court in the *Brady* case was concerned with the withholding of evidence which had been demanded or requested by the accused, the diligent defense counsel may wish to demand before trial an opportunity to see every part of the prosecutor's file, Refusal by the prosecution to grant this request may be followed up after the trial, as in *Brady*, by a motion for a new trial based on newly discovered evidence or a petition for post-conviction relief

[91] *Id.* at 86.
[92] *Id.* at 87, quoting from Napue v. Illinois, 360 U.S. 264, 269 (1959).
[93] *Id.* at 87-88.

under the applicable post-conviction procedure act. For purposes of such a petition, the defendant or his counsel will probably make allegations in very broad terms as to withholding evidence and then seek discovery of the documents which were not exhibited to the defense despite its prior broad request for evidence.

The prosecutor, either in a state or federal court, who is confronted with a sweeping demand from the defense for an opportunity to examine his file will face a considerable compulsion to grant such a demand. Otherwise, any conviction he obtains may be subject to constitutional attack on due process grounds; and to such an attack, the limitations on criminal discovery contained in the applicable rules of criminal procedure will have only slight relevance.

Can a new constitutional assault on the Jencks Act be launched from the vantage point of *Brady*? Probably not in the usual situation, since under that act the defense counsel does receive access to the pretrial statements of prosecution witnesses after their direct testimony and at a time when the pretrial statements can be effectively used for impeachment purposes. If, however, the pretrial statement of a Government witness contained information potentially of great assistance to the defense but of limited utility because of the time in the trial at which it was furnished to the defense counsel, an argument could be made that irrespective of the Jencks Act, the defendant had been deprived of due process by the withholding of evidence "which, if made available, would tend to exculpate him or reduce the penalty." Similarly, if, after the defense requested certain statements, the prosecutor withheld those statements on the ground that they had been made by a "prospective Government witness" within the meaning of 18 U.S.C. § 3500 (a), if this witness was not called and the statements were not furnished to the defense when the Government rested its case, and if these statements contained "leads" to evidence which would have materially benefited the defense, any conviction would seem subject to question on due process grounds.

In *Brady*, *Napue*, and *Alcorta*, the prosecutor had participated in withholding or suppressing evidence favorable to the defendant. What if, however, the prosecutor is unaware of the evidence favorable to the defendant because that evidence has also been withheld

from him by the investigators?[94] In other words, should the principle of *Brady* be affected by the identity of the governmental agent who "helps shape a trial that bears heavily on the defendant"? The actions of investigators in obtaining coerced confessions have led to reversal on due process grounds of the convictions resulting from those confessions.[95] Would and should their actions in withholding evidence lead to any different outcome?

V

CONCLUSION

A trend towards an expanded right of discovery for defendants in criminal cases is underway in state and federal courts. The availability of this right, together with the constitutional requirement that every accused be provided with legally trained counsel to represent him, will reduce some of the disadvantages suffered by an indigent defendant in the administration of criminal justice. In many situations, the broadening of the defendant's opportunity to obtain discovery should not impose an undue burden on the prosecution; but, for the problems which will be created, a sweeping reciprocal expansion of the prosecution's right to discovery does not seem the best solution.

The prosecution is also being placed under ever increasing responsibilities to assure on its own initiative that the defendant is furnished with information from its files which might tend to prove his innocence. The existence of these responsibilities may render academic some of the discussion which has taken place concerning the proposed amendments to the Federal Rules of Criminal Procedure and may remedy inadequacies in a defendant's opportunity for discovery, but it may also lead to lengthy post-conviction attacks predicated upon the contention that the prosecution has failed in its duty to provide information requested by the defense. These attacks may, in turn, produce a resigned willingness on the part of both state and federal prosecutors to follow the same broad discovery practice now employed in American courts-martial and English criminal courts.

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[94] The California Supreme Court indicated in *In re* Imbler, 387 P.2d 6, 35 Cal. Rptr. 293 (1963), that perjury by anyone connected with the prosecution or the failure to reveal knowledge of perjury of prosecution witnesses will justify reversal on due process grounds even if the prosecutor himself is unaware of the perjury.

[95] See, *e.g.*, Payne v. Arkansas, 356 U.S. 560 (1958); Leyra v. Denno, 347 U.S. 556 (1954).