Disclosure and Discovery in Criminal Cases: Where Are We Headed?

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COMMENT

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INTRODUCTION

In this period of emerging emphasis on criminal law and criminal law procedures, the concept of a fair trial emerges slowly along the lines of the due process of law requirements of our Federal Constitution.

It is generally recognized that: "Whatever disagreement there may be as to the scope of the phrase 'due process of law,' there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard."

The criminal trial is the adversary proceeding involving the people of the state against the individual accused. In this proceeding, the restraints and privileges accorded either side are the result of an experienced system of justice, tested by the centuries and matured by the civilization which it protects. Recognizing the dignity of the human life which hangs in the balance, society has accorded it privileges to protect that life, including the privilege against self-incrimination. In our country, that privilege is raised to the status of a constitutional right, applicable to the federal government and to the states alike. The State assumes, on its part, a heavy burden of proof which it must meet to prove an accused guilty of crime. The State must prove the defendant's guilt beyond a reasonable doubt while the defendant himself may stand silent and be presumed innocent until proven guilty. The advantages of these individual rights are manifold, but the question of the relative weight of these rights to the weight of the advantages available to the State has been discussed in cases and articles, leading to a growing debate of significant proportions. If we were to represent the opposing parties in a criminal case as two sides of a symbolic scale of justice, and deposit to the credit of either side the advantages available to that side, and remove from either side the relative weight of the disadvantages inherent in their positions, would they balance each other? Or would there be a noticeable difference in the set of the scales to the ultimate advantage of the State? If so, what procedural weight can be added to equalize this adversary

system? It is to these questions that this paper is addressed. To be considered first is the deliberate weighting of the prosecution's side of the scales to the complete disadvantage of the accused, followed by a discussion involving the growing recognition by the courts of the inherent inequality of the present system with a resulting trend to equalize the positions of the adversaries. There will be a brief look at the states' development of this liberal trend with an added discussion of Federal statutory law with its underlying constitutional dimensions.

THE DEVELOPMENT OF A CONSTITUTIONAL STANDARD FOR DISCLOSURE: FALSE EVIDENCE KNOWN TO THE PROSECUTION

In 1917, a defendant in a murder trial was convicted by perjured testimony and sentenced to die, and the sentence was later commuted to life imprisonment. Although perjury is always a possibility in any trial, and the possibility of an innocent man being convicted through perjured testimony is always present, the startling fact in this case was that the prosecutor knew about the perjury, and, indeed, encouraged it. In 1934, this defendant, through a petition for habeas corpus to the United States Supreme Court, brought before the Court the issue of whether this knowing use of perjured testimony by the prosecutor was a violation of the Fourteenth Amendment of the United States Constitution. In the case of *Mooney v. Holohan*, the Court, in a per curiam opinion, said:

That requirement (of due process), in safeguarding the liberty of the citizen against deprivation through the action of the state, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. (Emphasis added.)

In 1942, the Court was faced with a similar situation wherein the defendant had been imprisoned as a result of perjured testimony, knowingly used by the State authorities to obtain his conviction, and also through the deliberate suppression by those same authorities of evidence favorable to his defense. Citing *Mooney*, the Court held this action by

4. 294 U.S. 103 (1934).
5. 294 U.S. 103, 112 (1934).
7. 294 U.S. 103, 112 (1934).
the prosecution to be a violation of the due process clause of the Fourteenth Amendment.

The standard of knowing use of perjured testimony and suppression of evidence favorable to the defense as a violation of due process was not extensively altered by *Alcorta v. Texas.* In that case, the defendant was convicted of murdering his wife and sentenced to death. His defense was that he had found his wife kissing another man late at night in a parked car. Suspecting his wife's infidelity, the defendant was overcome by a fit of rage and he stabbed his wife to death. Under Texas law, if the jury had accepted his story, they could have found him guilty of "murder without malice," punishable by a maximum sentence of five years' imprisonment. At the trial, however, the "other man" testified that he had not been kissing the wife, that he was merely driving her home from work as he had done several times before that fatal evening. Later, the prosecution witness confessed that he had had sexual intercourse with the defendant's wife on many occasions. He also stated at the habeas corpus hearing that he had informed the prosecutor of this fact before the trial. The prosecutor's response was a request that he not volunteer any information about this affair to the court and jury. The prosecutor himself admitted the truth of these statements. It was held in a per curiam opinion that the defendant was denied due process of law by the State.

Chief Justice Earl Warren wrote the majority opinion in a 1959 case that broadened the constitutional standard to which prosecutors were to be held. In this case, the defendant was convicted of murder and sentenced to a 199 year term in a trial in which the principal state witness was an accomplice of the defendant who had already been convicted and sentenced to a similar term. This witness said in answer to a direct question of the prosecutor that he had received no consideration or benefit for his testimony, except that a "public defender" promised to do what he could for him. In actuality, the Assistant State's Attorney had promised him consideration. At the trial, the prosecutor did nothing to correct this perjured testimony. The Court held that the trial was nevertheless

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8. *355 U.S. 28 (1957).*
11. The Illinois Supreme Court affirmed the conviction on the basis that even though the Assistant State's Attorney had promised the witness consideration if he would testify at petitioner's trial, and that the Assistant State's Attorney knew that the witness lied in denying he had been promised consideration, the jury had been apprised that a "public defender" had promised "to do what he could" for the witness. The United States Supreme Court rejected this reasoning of the state court. The Court felt that even though the jury was aware that "someone" promised the witness aid, if they had known that the "someone" was the very attorney prosecuting the case, they might well have concluded that the witness had fabricated testimony to curry his favor.
sufficiently tainted to deny the defendant due process of law. In the
course of his opinion, the Chief Justice stated:

The principle that a state may not knowingly use false evidence,
including false testimony, to obtain a tainted conviction, im-

plicit in any concept of ordered liberty, does not cease to apply
merely because the false testimony goes only to the credibility
of the witness. The jury's estimate of the truthfulness and re-
liability of a given witness may well be determinative of guilt
or innocence, and it is upon such subtle factors as the possible
interest of the witness in testifying falsely that a defendant's
life or liberty may depend.12

It is important in the consideration of this case to note that the prose-
cutor did not deliberately solicit false evidence, although he did not
correct it when it appeared in the testimony.

In a recent opinion of the Supreme Court, announced on February 13,
1967,13 the conviction of the defendant was reversed, the court citing the
principle enunciated in Mooney.14 In this case, the defendant, a cabdriver,
was arrested and held incommunicado until he was "persuaded" to sign
a police-written confession that he was the perverted individual who had
raped and murdered a young child. The defendant recanted the confession
later, but the most damning evidence used in the chain of circumstantial
evidence was a pair of bloody men's shorts. A chemist testified for the
State that the shorts were stained with blood of the same type as that of
the little girl. The shorts had been found discarded about a mile from the
rape scene by a policeman, and although the defendant said they were not
his shorts or even the same type he wore, the jury brought in a verdict of
guilty. The defense counsel requested before trial a chance to examine
and test all physical evidence held by the prosecution. The trial judge
decided the request after the prosecution vigorously denounced the peti-
tion. At the habeas corpus hearing, the defense was permitted to have
their own chemist inspect the shorts. The result was startling: the stains
on the shorts were paint stains and there were no traces of blood to be
found. Even more startling was the fact that while the prosecutor was
arguing in his closing before the jury (by waving the stained shorts
before their eyes) that they contained the blood type of the little girl,
he knew that the stains were only paint and that, in fact, they were not
defendant's shorts. Although not mentioned in the case itself, it was re-
vealed further at the hearing that the defendant's landlady knew that the
defendant was asleep in his room at the time of the killing, but was ad-

vised by the prosecutor that she needn't become involved and that she had a constitutional right to "silence." ¹⁵

PROSECUTION'S SUPPRESSION OF EVIDENCE FAVORABLE TO DEFENDANT

The question of whether the suppression of favorable evidence alone by the prosecution would be a violation of due process was considered in an important decision, *Brady v. Maryland.* ¹⁶ In that case, the prosecution withheld from the defense extra-judicial statements of the defendant's companion in the crime. This companion had made statements to the police authorities, one of which contained an admission that the companion had done the actual killing. The defendant, in his trial, admitted his participation in the crime, but claimed, without proof, that it was his companion who did the killing. Although conceding that his client was guilty of first degree murder, the defense counsel requested from the jury a verdict "without capital punishment." The sentence given, however, was death. Before trial, defendant's counsel had requested an examination of these extra-judicial statements of the companion. The prosecution turned over most of the statements, but pointedly omitted the crucial statement. The contents of this statement were withheld from the defense until after the defendant's conviction had been affirmed by the Maryland Court of Appeals. In the appeal to the Supreme Court of the United States, there was no claim of the use of perjured testimony. This case presented only the question of suppression of evidence by the prosecution which might have an effect on the punishment of the defendant, but not on the guilt or innocence of the party; the issue was whether this suppression was a violation of due process. The Maryland Court of Appeals had held that this suppression of evidence by the prosecution denied the defendant due process of law, and the case had been remanded for a new trial on the question of punishment, but not on the question of guilt. The Supreme Court of the United States affirmed the Maryland court decision holding: "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." ¹⁷

THE STANDARD

These cases establish a constitutional standard of conduct for the prosecution, the violation of which constitutes a deprivation of a defendant's life and liberty without due process of law. A prosecutor under this standard may not:

¹⁵. For an interesting article on this case, see *Time,* March 31, 1967.
(1) knowingly use perjured testimony or allow it to go uncorrected
(2) suppress evidence favorable to an accused who has requested it
where such evidence is material either to (a) guilt or (b) pun-
ishment of the defendant.

It is also important to add that the Brady standard\textsuperscript{18} applies regardless
of the good faith or bad faith of the prosecution. The trend seems to be
developing, therefore, that the courts will look more toward the prejudice
to an accused rather than look at the intention of the prosecutor. As a
result, the conduct of the prosecutor will be held to a high standard that
will tend to make him liable absolutely regardless of his intentions. The
prosecutor will be forced to look at the fairness of the proceeding with
more attention than he previously did. A cursory examination of a few
federal court cases will reveal this trend.

**APPLICATION OF THE STANDARD**

In a Third Circuit case in 1955, the defendant raised a defense of
drunkenness in a trial for murder.\textsuperscript{19} The prosecutor presented testimony
of police officers and others who said that the defendant was not drunk.
The prosecutor also knew that one police officer informed him of his
opinion that the defendant was intoxicated, and although that witness
was present in the courtroom and could have been called as a witness, the
prosecutor refused to do so, or to tell the defense about the existence of
this witness. The interpretation of the constitutional standard in this
case was how useful the suppressed evidence was to the defense. Under
this application of the standard, there is an implication that the prose-
cution must reveal all relevant evidence to the defense.

In a murder trial in Texas, two defendants were convicted of the
murder of a real estate man after or during a three-party sexual orgy in
the deceased's office.\textsuperscript{20} It was undisputed that one of the two defendants
did the killing. The defense presented at the trial was self-defense, and
not insanity since the defense counsel had his clients examined by a psy-
chiatrist who found them to be legally sane. There were other psychiatric
examinations instigated by the District Attorney, including one per-
formed by the County psychiatrist and a special examination by a prac-
ticing psychiatrist assisted in the task by a psychologist. The results of
the special examination were relayed to the District Attorney on two
separate occasions before the trial, and the results stated that in the
professional opinion of the two men, the two defendants were legally
incompetent. This report was in direct contrast to the report by the
County psychiatrist who, like the defense-sponsored examination, found

\textsuperscript{18} 373 U.S. 83, 87 (1963).
\textsuperscript{19} United States ex rel. Thompson v. Dye, 221 F.2d 763 (1955).
\textsuperscript{20} Ashley v. Texas, 319 F.2d 80 (1963).
the defendants legally sane. The District Attorney failed to disclose the special examination or its results. The question presented on appeal was whether this failure to disclose denied the defendants due process of law. As stated by the court, did the failure of the District Attorney to disclose to the defendants the fact, known to him, of the existence of opinions arrived at by specialists engaged by the State favorable to the accused if known in time for them to plan the strategy of, and conduct their trial, deny the defendants due process of law as to invalidate the trial? The evidence suppressed by the State was merely opinion evidence, but it bore great weight, beyond its expert quality, because it was objective, and more especially, because it was solicited by the prosecution. The court, however, states that it is not the nature or weight to be accorded to the opinion, but the fact that such an opinion had been formed. The prosecution in this case again may have been acting in good faith since, of the three examinations, two held that the defendants were legally sane, one of which was conducted by the defense itself. The court, it seems clear, looked more at possible prejudice to the presentation and preparation of the defendant's case in determining a violation of due process than to the intent of the prosecutor which was also considered.

In another interpretation of the Supreme Court standard, a 1964 habeas corpus hearing considered the *Brady* rationale and holding as applying to the facts of the case before it, even though there was no request by the defense for the disclosure of evidence held by the prosecution as there was in *Brady*. In this case, the defendant was convicted of robbery after being identified by prosecution witnesses as one who was involved in the crime. However, the prosecution suppressed statements made by two other witnesses at the scene of the crime who positively stated that the defendant was not one of the men who had robbed the store. This information would have helped the defense prepare its case and would have presented two witnesses favorable to the defense. The Court had no difficulty in finding a violation of due process, although if *Brady* had been literally applied, the lack of a request by the defense could have been fatal.

The lower federal courts are liberally construing the Supreme Court holdings in this area of suppression of evidence by the prosecution. The trend for liberality in this area has been developing in a few states, including our own state of Pennsylvania. In a section following, state developments will be considered. For our purposes, a recent case decided by the Supreme Court should be considered for clues to try to discover the leaning of the Court in this area.

In a wooded swimming area on a warm summer evening, a girl and her date sat alone in a stalled car. The boys who had come to the spot with them went for gasoline when the car ran out of gas. After a time span of approximately fifteen minutes, the solitude of the young couple was disturbed by the appearance of three young men who had been swimming and fishing there all evening. There is a conflict as to what caused the event in question, but the three boys outside the car broke the window in an effort to either get into the car or to get the occupants out. While the girl's date vainly attempted to hold off the three intruders, the girl ran out of the car into the woods. The girl's date was quickly knocked unconscious while one of the trio set out in pursuit of the girl. The pursuer caught up with the girl and stayed with her until his companions arrived on the scene. Again there is a conflict in the stories as to what happened here, but in either case, the girl had intercourse with at least two of the boys and probably all three. Regaining consciousness, the girl's date went for the police who arrived shortly to find an hysterical girl partially disrobed. The charge was rape, and all three boys were convicted. At the trial, the prosecutrix testified that she had submitted to the defendants' advances out of fear; the defendants claimed that she had consented. In a post-conviction proceeding, two of the defendants alleged that the prosecution denied them due process of law in violation of the Fourteenth Amendment by (a) suppressing evidence favorable to them, and (b) by knowing use of perjured testimony against them. In an evidentiary hearing, it was revealed that the prosecution had suppressed evidence concerning the prosecutrix. Such evidence included these facts:

1. One month before the rape, a caseworker had recommended probation for the prosecutrix because she was beyond parental control.
2. One month after the rape, the prosecutrix attended a party at which she had intercourse with two men. That evening she took an overdose of pills and was rushed to a hospital where she told a friend that she had been raped at the party. This friend informed the police, but she later recanted the rape story to a police officer and admitted that she had had numerous sexual relations with numerous boys and men, some of whom she did not know.
3. The prosecutrix was committed to a home for girls in a neighboring county.

None of this evidence was known to the defense counsel who had been appointed by the court, although he had made attempts to discover information about the girl and these attempts had been blocked by the prosecution. The judge at the evidentiary hearing ruled that there was

24. 386 U.S. 66 (1967). This opinion was announced February 21, 1967.
no showing of the known use of perjured testimony by the prosecution. Citing the Brady25 standard, the judge found a denial of due process by the suppression of the evidence; the rule adopted in this determination was: there is a denial of due process if the evidence suppressed could reasonably be considered admissible and useful to the defense, regardless of a lack of request for such evidence by the defense. This evidentiary decision, on appeal, was reversed because the Maryland Court of Appeals felt that the test used by the judge was incomplete. The proper test, as interpreted by the majority, would have to include that the evidence be material and capable of clearing or tending to clear the accused of guilt or of substantially affecting the punishment to be imposed. Under this stricter test, the suppressed evidence did not qualify as being sufficient to require a new trial.

Thus, the issues presented to the Supreme Court were:

1. Does the prosecution’s constitutional duty to disclose extend to all evidence admissible and useful to the defense?
2. What degree of prejudice must be shown to make a new trial necessary?

The Court avoided these questions. Relying on the rationale and holding of the Napue26 case, three of the majority, using evidence before them which was not available at the evidentiary hearing or the appeal therefrom, remanded the case to the Maryland Court of Appeals for a new determination. This “new” evidence formed part of the work product of the prosecution and consisted of police reports which contradicted testimony at the trial by the prosecutrix and her boyfriend. Under the Napue test,27 a conviction will be reversed when the prosecution, although not soliciting false evidence, allows it to go uncorrected when it appears, even though the testimony may be relevant only to the credibility of a witness.

Justice White concurred in a separate opinion.

Justice Fortas, in a separate opinion, faced the broad constitutional questions presented by this case. Premising his opinion with the statement that it is the state’s obligation not to convict, but to see that, so far as possible, truth emerges, he says this is the ultimate statement of the State’s responsibility to provide a fair trial under the due process clause of the Fourteenth Amendment.

No respectable interest of the State is served by its concealment of information which is material, generously conceived, to the case, including all possible defenses.

Justice Harlan took issue with this opinion in his dissent, saying it suggested a standard much too broad for the requirements of the Constitution. Justice Harlan cited the *Brady* standard as satisfying in full the requirements of the Fourteenth Amendment, while providing a firm line beyond which the Court must not move. Basically, the dissent expresses the true realization that Justice Fortas' standard would drastically alter the character and balance of our present system of criminal justice.

In an addendum, Justice Fortas answers Justice Harlan:

A criminal trial is not a game in which the State's function is to outwit and entrap its quarry. The State's pursuit is justice, not a victim. If it has in its exclusive possession specific, concrete evidence which is not merely cumulative or embellishing and which may exonerate the defendant or be of material importance to the defense—regardless of whether it relates to testimony which the State has caused to be given at trial—the State is obliged to bring it to the attention of the court and the defense.

Justice Fortas concludes that the request by the defense that is part of the *Brady* standard should not be required by the Court since the defense may not know of the existence of the evidence.

It seems clear that the Court in this case is reluctant to face the broad constitutional question which it had presented. Only Justice Fortas pushed for a broad constitutional standard to be imposed on the state courts. Justice White does not seem to have moved from his position in *Brady* and if this question is presented to the Court again, he would probably join the Justice Harlan minority. The majority mentioned the broad question to be answered and then quickly found as the basis for their opinion the settled standard of *Napue*. The broad disclosure standard advocated by Justice Fortas would completely catch the state courts and federal courts unprepared; it would be a much more liberal standard than these courts have been accustomed to and the Court is plainly wary of the results of such a move. More study will have to be made and more arguments heard before the Court will confidently establish a standard to which, it appears, it is sympathetic, and probably, favorable. The Court in this case is asking for time.

29. 373 U.S. 83, 92 (1963). Justice White stated in that opinion: "I would employ more confining language and would not cast in constitutional form a broad rule of criminal discovery. Instead, I would leave this task, at least for now, to the rule-making or legislative process after full consideration by legislators, bench, and bar."
In line with the liberal trend for disclosure of evidence by the prosecution as required by the Fourteenth Amendment, the trend toward liberal pretrial discovery is advancing in several states, notably in New Jersey, California, and also in New Hampshire, New York and Washington.

The common law rule generally has been that in the absence of a statute or court rule to the contrary, a person accused of crime is not, as a matter of right, entitled to inspection or disclosure of evidence in the possession of the prosecution. In support of this position, the argument is made that the defendant has every advantage. As Judge Learned Hand put it:

Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see.

This position was recently reaffirmed by the Pennsylvania Supreme Court in an opinion by Justice Bell.

The opposite position maintains that the advantages of the defendant are illusory, that in fact the prosecution has all the cards, and that, unless the defense has 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. Attorneys taking this position demand discovery of such items as (a) defendant's own statements to the police and other prosecution authorities; (b) statements made by prosecution witnesses:

38. Commonwealth v. Caplan, 411 Pa. 563, 192 A.2d 894 (1963). In this case, defendant was indicted for conspiracy, burglary, larceny and receiving stolen goods. Defendant's counsel petitioned to find out the names of persons participating with the defendant in these crimes, and copies of all statements of all witnesses listed on the bill of indictment. This was denied. In his opinion, Justice Bell distinguished civil discovery and criminal discovery and generally reaffirmed the Hand view.
(c) statements made by people not to be called as witnesses; (d) background information of prosecution witnesses; and (e) the results of scientific tests performed by the prosecution.

In a well-reasoned article on the balancing of advantage in our criminal procedure, Abraham Goldstein advocates creation of a free deposition and discovery procedure in criminal cases in much the same manner as is presently employed in civil cases. According to Mr. Goldstein, a trial is "the occasion at which well-prepared adversaries test each other's evidence and legal contentions in the best tradition of the adversary system." To create this commendable system, "there can be no substitute for a deposition, discovery and pretrial procedure." The usual arguments by those in opposition to this advance in criminal law are answered convincingly in this article. The favorite argument advanced against pretrial discovery is that the accused will, by gaining access to the case against him, prepare a defense by perjury, or intimidate the witnesses against him. This view is predicated on the theory that all of those indicted to stand trial are guilty, while in our system of justice a man is presumed innocent until proven guilty. Moreover, there are laws against intimidating witnesses. An accused would also find himself under closer scrutiny by the State, and he would be more apt to behave himself. Of course, specific fact situations can be raised wherein a danger would exist with pretrial discovery, especially toward prosecution witnesses, but Mr. Goldstein believes that systems of procedures are built on generalizations and that our system of justice is mature enough to withstand these possible dangers. Mr. Goldstein believes that the Hand view is grossly exaggerated and that the defendant often pays dearly for his privilege against self-incrimination. He may not be convicted out of his own mouth, but yet his own body may be used against him: his fingerprints, his blood, his handwriting, etc., may be removed by the police. Pretrial discovery available to the prosecution is far-reaching and it cannot be matched by what is available to the defendant or what the defendant may keep from the prosecution.

These views are gaining converts in the legal profession and on the bench. The premise that truth is best revealed by a decent opportunity to prepare in advance of trial and that what is valid in civil cases should be likewise as valid in criminal trials was considered in a 1959 New Jersey case. The court refused to grant defendant's motion for pretrial discovery of statements made by prospective witnesses because of a...
rule of court barring such discovery, and because they doubted the practicality of the step. However, the court did grant defendant's motion to see his own statements, a major step in this state since State v. Tune, and a significant first step towards complete pretrial discovery.

California has been in the vanguard of this liberal advance in pretrial discovery in criminal cases, but the determination of when and what will be disclosed before trial is a matter of discretion for the courts. The California system of pretrial discovery is balanced by practical considerations.

There must be a balancing of the right of a defendant to discover potentially material witnesses with the probability that such discovery might lead to the elimination of an adverse witness or the influencing of his testimony. In balancing these competing factors the trial court must be allowed great discretion.

The California Supreme Court, per Justice Traynor, in 1962, even allowed pretrial discovery by the prosecution of evidence in the hands of the defense concerning the affirmative defense to be advanced at trial. This case is extremely important in that a great judicial mind wrestled with a problem that will be vexing the judiciary for a long time in the future. Criminal discovery presupposes mutuality which is seemingly impossible with criminal cases because of our rule against compulsory self-incrimination. Advocates of criminal discovery point to discovery on the part of the defendant as a means of ascertaining the truth. These same advocates protest, however, when the prosecution demands an equal right to discover the defendant's evidence. A defendant in a criminal case may not be compelled to testify or to produce private documents in his possession. Thus, the battle lines are drawn and a crucial dilemma is created; the merits of criminal discovery versus compulsory self-incrimination. Justice Traynor met the challenge and resolved it to his own satisfaction. There are valid dissents to his position as expressed in the same case, but the opinion represents a new analysis of the purpose and meaning of the privilege against self-incrimination. Historically, the privilege against self-incrimination developed to prevent the torture and bullying of defendants. The states adopted constitutions containing this right against self-incrimination because the memory of tyrannic treatment was fresh in the minds of the drafters. Today, the threat of torture is not as real and in a state as advanced as California in the area of criminal discovery, Justice Traynor has taken a new look

46. Ibid.
47. McCORMICK, EVIDENCE § 120 (1954).
at the privilege. The privilege is still to be protected by the courts. The defendant, however, may waive the privilege and testify. Justice Traynor believes that he may also partially waive the privilege by advancing an affirmative defense. The evidence will be revealed at the trial, reasoned Justice Traynor, so why not disclose it before trial and give the prosecution ample time to work with it. The element of surprise is not as important in a criminal trial as some attorneys profess. As Justice Traynor expressed it:

There is more tensile strength in the adversary system and a deal more nobility in the profession where adversaries foster procedures that set them free from trick and device and enable them to meet in grand encounter on the issues.  

He further clarifies his understanding of the privilege against self-incrimination as it conflicts with criminal discovery in this manner:

The privilege against self-incrimination protects the defendant from assisting the prosecution in proving his guilt. Once he makes a defense, however, through testimony or the disclosure of material witnesses or through documents or other real evidence, he opens the door to the discovery of evidence against him that might otherwise remain undiscovered. It rests with the defendant to determine the extent to which he wishes to waive his privilege. To do so intelligently, he must be informed of the case against him before trial. (Emphasis added.)

In other words, criminal discovery by the defendant liberalizes the privilege against self-incrimination. The purpose of having the privilege is altered by the conditions of open criminal discovery. This analysis is reasonable and shows a great deal of thought and consideration of the problem. Discovery, in civil as well as criminal cases, is designed to further the truth. Truth, of necessity, requires a mutuality that may be realized while still recognizing the individual's rights that will protect him from arbitrary government action. Other solutions may be advanced in the future to solve this dilemma; Justice Traynor's analysis will remain as a carefully considered answer that must be dealt with in developing anything better.

PRESENT SITUATION IN FEDERAL COURTS

In the federal courts at the present time, a defendant has illusory pretrial discovery and limited discovery during a criminal trial. The federal approach to discovery is found in three areas:

49. Id. at 248.
(1) Case law
(2) Federal Rules of Criminal Procedure
(3) The Jencks Act

Each area unsatisfactorily meets the problem either separately or together.

Case law simply reveals a discretionary system where the trial judge arbitrarily decides what evidence, if any, may be revealed to the defendant. Reliance by the trial court on the Federal Rules of Criminal Procedure and the Jencks Act results generally in limited discovery by the defendant only during the course of a trial.

The defendant's rights of discovery under the Federal Rules of Criminal Procedure are covered under Rule 7(f), Rule 16 and Rule 17(c).

Rule 7(f) allows a defendant to move for a bill of particulars to obtain additional information to clarify the indictment. The test often employed by the court is whether the clarification is necessary to prevent surprise or possible double jeopardy.

The disadvantages under Rule 7(f) are: (1) the motion is seldom granted for discovery of evidentiary matters and (2) witnesses' names and addresses are generally not released. The trial judge knows that these applications are within his discretion and that an appellate court will not disturb them unless abuse is shown.\textsuperscript{50} Rule 7(f) was recently amended\textsuperscript{51} to eliminate the requirement of a showing of cause, although the element of discretion is retained.

Rule 16 confers upon a defendant a right of discovery of prosecution evidence. However, it is restricted to items including books, papers, documents and tangible objects taken from the defendant in any manner or to books, papers, documents and tangible objects taken from others only by seizure or process.

The burden is placed on the defendant to:

(1) designate the item sought to be produced;
(2) show that the item is in the possession of the government;
(3) a. show that the item was obtained from, or belonged to him OR b. show that the item was obtained from another by seizure or process;
(4) show that the item may be material to the preparation of his defense.


\textsuperscript{51} Amendments adopted July 1, 1966.
Motions under Rule 16 are addressed to the discretion of the court. Rule 16 does not require the government to open its files for inspection by a defendant, or to disclose the identity of witnesses to be called by it, or to identify what documents have been used before the grand jury or are to be offered in evidence at the trial.

The recent amendments have changed old Rule 16. Today the defendant will no longer be required to show that the material was obtained from the defendant by legal process. Rule 16 was expanded in that now a district court is empowered to permit inspection of books, papers and documents or tangible objects which are in the possession, custody or control of the Government on a showing that the items sought may be material for the preparation of the defense and that the request is reasonable.

Rule 17(c), governing subpoenas, has not been amended and in practice the courts have been restrictive.

Reports made by government agents or statements made by government witnesses are not subject to pretrial discovery. Limited discovery at the trial is allowed under the procedure described in the Jencks Act. The Jencks Act and its history will be considered separately.

THE JENCKS ACT

Section 9(h) of the National Labor Relations Act required a union officer to file with the National Labor Relations Board an affidavit stating that he was not a member of the Communist Party, and had not been affiliated with such party. Jencks, the president of a labor union, filed such an affidavit and as a result was indicted and convicted for falsely swearing that he was not a member of the Communist Party. Two paid FBI informers posed as Communists and reported to the FBI the activities of Jencks as a member of the party. At the trial, Jencks' attorney made a motion for permission to inspect the reports of the agents for use in cross-examination of the informers who had testified for the government. The trial judge refused to grant the request, saying that the defense had to lay a preliminary foundation between the contents of the reports and the testimony of the informers. The Supreme Court, per Justice Brennan, held that the defendant was entitled to an order directing the government to produce for inspection all reports of the two informer agents in its possession, written, and when orally made, as recorded by the FBI, touching the events and activities as to which they testified. The Court held further that the defendant was entitled to inspect the reports to decide whether to use them in his defense. The Court, in this decision, was exercising its supervisory powers over federal criminal justice. Heretofore, the trial judge had discretion

52. 353 U.S. 657 (1957).
to deny inspection when the witness did not use his notes or memoranda in court. The Court disapproved this practice and held that only after inspection of the reports by the accused must the trial judge determine admissibility.

Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government’s witness and thereby furthering the accused’s defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less.

Justice Clark dissented:

Unless the Congress changes the rule announced by the Court today, these intelligence agencies of our Government engaged in law enforcement may as well close up shop, for the Court has opened their files to the criminal and thus afforded him a Roman holiday for rummaging through confidential information as well as vital national secrets.

The Congress did act and the “Roman holiday” was averted. The Jencks Act was passed in 1958, substantially reaffirming the decision in the Jencks case. In effect, the statute allows inspection by the defense of:

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 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.”

Such inspection, however, may not be requested until that witness has testified on direct examination in the trial of the case. After a Government witness has testified on direct examination, the defense may request any statement of that witness in the possession of the Government which relates to the subject matter of the testimony of the witness. If the Government protests that a statement requested does not relate to the subject matter of the testimony of the witness, the court will inspect the statement in controversy and exercise its discretion by excising such portions of the statement which do not apply. Provisions for an appeal

by the defense are available and an appellate court in the proper circum-
stances may determine the correctness of the ruling by the trial judge.\textsuperscript{60}

Thus, the Congressional Act supercedes the Court decision\textsuperscript{61} and the
procedure involved in the Jencks Act simply allows defense counsel to
ask for statements made by a government witness who has already
testified in the trial, such statement relating to the testimony by the
witness.

There have been a few Supreme Court decisions interpreting the
statute. \textit{Palermo}\textsuperscript{62} held that the Jencks Act became the exclusive, limit-
ing means of compelling for cross-examination purposes, the produc-
tion of statements of a government witness to an agent of the govern-
ment. In 1963, the Court liberally interpreted § 3500(e)(1), defining
the word “statement” to include a report by an FBI agent of an inter-
view with a witness, written seven hours after the interview from notes
which the agent had read to the witness and which the witness agreed
to be “straight.”\textsuperscript{63} The Court said that the approval by the witness of the
notes satisfied the requirements of the statute.

What is the rationale of the Jencks decision? The Court was concerned
with the obvious disadvantage that an accused, particularly an indigent,
must overcome in his defense. The government’s advantage over the
defendant in greater discovery of evidence and better facilities to gather
the evidence must be allowed to be equalized somewhat by \textit{effective}
cross-examination of government witnesses. Although the Court based its
decision on supervisory, non-constitutional grounds, Justice Brennan
noted in \textit{Palermo}:\textsuperscript{64}

\begin{quote}
It is true that our holding in Jencks was not put on constitu-
tional grounds, for it did not have to be; but it would be idle
to say that the commands of the Constitution were not close
to the surface of the decision.\textsuperscript{65}
\end{quote}

Pennsylvania, alone among the states, interpreted the rule of the
Jencks case as having a constitutional basis. In \textit{Schesinger Appeal},\textsuperscript{66} the
Supreme Court of Pennsylvania stated:

\begin{quote}
Nor is the rule of the Jencks case peculiar to federal criminal
prosecutions; it is a requirement of due process of law.\textsuperscript{67}
\end{quote}

\begin{footnotes}
\item 60. Jencks Act, 18 U.S.C. § 3500(c) (Supp. 1967).
\item 62. 360 U.S. 343 (1959).
\item 64. 360 U.S. 343 (1959).
\item 65. 360 U.S. 343, 362 (1959).
\item 66. 404 Pa. 584, 172 A.2d 835 (1961).
\item 67. \textit{Id.} at 613.
\end{footnotes}
In 1965, Justice Michael A. Musmanno wrote the majority opinion in Commonwealth v. Smith, in which he held that the right of the defendant in that case to obtain statements made by two prosecution witnesses, such statements being kept in the files of the FBI, was a constitutional right of the defendant under the Sixth Amendment and Fourteenth Amendment of the Constitution of the United States and under Article I, section 9 of the Pennsylvania Constitution.

CONCLUSION

On the basis of the case development and statutes herein explored, there appears to be a definite trend of liberal proportions, not only in the Supreme Court of the United States, but in the States, for the adoption of broad discovery rules as a requirement of due process. This is a most important development in criminal procedure, because the disclosure requirement strikes at an unfair system and assures even the indigent defendant a fair trial by giving his counsel adequate discovery powers to prepare an adequate defense. This requirement, as an important element of the fair trial requirement of the Fourteenth Amendment, recognizes the adversary system as a battle of equals (as much so as humanly possible) and also recognizes the maturity of the legal system in which we operate. By adding the procedural weight of a constitutional right of pretrial discovery to the defendant's side of the scales of justice, society can only benefit in the resultant equality of position. The game element of a criminal trial will be eliminated and justice, based on truth rather than advantage, will prevail.

J. William McLafferty

69. The 6th Amendment to the Constitution of the United States guarantees to the accused the right "to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense." While this amendment is directed to federal criminal prosecutions, the Supreme Court of the United States held in Gideon v. Wainwright that that part of the 6th Amendment requiring assistance of counsel is binding on the States. Since the process sought to be here invoked had to do with documents in the possession of the Federal Government, the 6th Amendment would apply, and a refusal to comply with the mandate would amount to denial of due process guaranteed under the 14th Amendment. 417 Pa. at 329 (1965).
70. Art. I, § 9, PA. CONST.: In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and, in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage; he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land.