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Prosecutorial Discovery: An Overview

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PROSECUTORIAL DISCOVERY: AN OVERVIEW

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I. INTRODUCTION

> We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgment were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of the courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.[1]

This quote evidences a rapidly developing view that the ends of justice are more apt to be achieved if both the prosecution and the defense are required to "lay their cards on the table." As a result, several states have enacted statutory schemes permitting limited prosecutorial discovery. Even with these statutes, some state courts have upheld prosecutorial discovery beyond that provided by statute. Similarly, the Federal Rules of Criminal Procedure now contain provisions allowing the government access to certain kinds of defense material.[2] In West Virginia, the new Rules of Criminal Procedure also provide for such discovery.[3]

Despite the growing trend favoring prosecutorial discovery, several issues have been raised which suggest that such discovery

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[1] United States v. Nixon, 418 U.S. 683, 709 (1974).

[2] *See* FED. R. CRIM. P. 16.

[3] *See* W. VA. R. CRIM. P. 12.1, 12.2, 16 (Proposed Final Draft).

is impermissible. Among these are whether prosecutorial discovery infringes upon the privilege against self-incrimination; the extent to which due process is implicated under discovery schemes; whether the work product doctrine bars discovery; the extent to which the attorney-client privilege precludes defense disclosures; and, finally, whether trial courts have the power to enter discovery orders in the absence of express legislation.

It is the purpose of this article to analyze and discuss these various issues for they have undoubtedly become of primary importance to West Virginia practitioners.

II. ISSUES

A. *The Privilege Against Self-Incrimination*

Prosecutorial discovery was, in the past, viewed as impermissible primarily because of the privilege against self-incrimination.[4] In fact, the earliest Supreme Court decision denying prosecutors the right to discovery was based solely on the Court's belief that "[a]ny compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government."[5] In light of this broad definition ascribed to the scope of the privilege, very little discovery existed in criminal cases until recently.

By 1968, however, pre-trial discovery in criminal cases had drastically changed. Much of this change came about because of a re-definition of the privilege against self-incrimination as it related to prosecutorial discovery.

As earlier defined, the privilege had encompassed both testimonial and real evidence.[6] Starting with *Schmerber v. Califor-*

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[4] *See* U.S. CONST. amend. V. which provides in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." This common law privilege is also embedded in the constitutions of every state with the exception of Iowa and New Jersey. In Iowa, however, the privilege is preserved by implication by the constitutional mandate against the deprivation of life, liberty or property without due process of law. *See* State v. Height, 117 Iowa 650, 91 N.W. 935 (1902). Similarly, the privilege in New Jersey still exists as a part of the common law. *See* State v. Zdanowicz, 69 N.J.L. 619, 55 A. 743 (1903).

[5] Boyd v. United States, 116 U.S. 616, 631-32 (1886).

[6] *See id.*

nia,[7] however, the Supreme Court retracted the broad boundaries of the privilege. In *Schmerber*, the Court held that the scope of the privilege was limited to only "communications" or "testimony" and that the "compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate [the privilege]."[8] In *Couch v. United States*,[9] the Court further elaborated that the privilege against self-incrimination was an intimate and personal right which protected the private inner sanctum of individual feeling and thought against state intrusion bent upon extracting self-condemnation.[10] Because of its changed view as to the scope of the privilege, the Court, in *United States v. Nobles*,[11] had little difficulty in concluding that a defendant may be compelled to disclose information regarding statements of third-party witnesses.[12]

The approach initially taken by the Supreme Court in limiting the scope of the privilege is interesting for the earliest state case permitting extensive prosecutorial discovery avoided the self-incrimination issue rather than directly address it. In *Jones v. Superior Court*,[13] the California Supreme Court held that as long as prosecutorial discovery was limited to items or witnesses that would later be revealed at trial, the constitutional right was not implicated. The court reasoned that since the defense would reveal these items at trial anyway, and thereby waive the privilege, an earlier revelation exacted no penalty and, thus, was not a violation of the privilege. Instead, the earlier revelation merely helped the prosecution to be more effective.[14]

Interesting enough, the United States Supreme Court also applied this same reasoning in *Williams v. Florida*[15] when it stated:

> Nothing in the fifth amendment privilege entitles a defendant as a matter of constitutional right to await the end of the

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[7] 384 U.S. 757 (1966).
[8] *Id.* at 764.
[9] 409 U.S. 322 (1973).
[10] *Id.* at 327.
[11] 422 U.S. 225 (1975).
[12] *Id.*
[13] 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962).
[14] *Id.* at 61, 372 P.2d at 922, 22 Cal. Rptr. at 882.
[15] 399 U.S. 78 (1970).

> State's case before announcing the nature of the defense, any more than it entitles him to await the jury's verdict on the State's case-in-chief before deciding whether or not to take the stand himself.[16]

The dissenting opinion of Justice Peters in *Jones* rejected the majority rationale later adopted by the United States Supreme Court. He argued that because of the prosecutor's heavy burden of proof, the defendant should not open up any source of potentially adverse information unless he felt that the state had proved its case. Thus, the defendant could not adequately make this judgment until after the prosecutor had presented evidence in court. Even with extensive discovery, there was no way before the trial that the defendant could know the strength of the evidence against him.[17] Nonetheless, this line of reasoning was obviously rejected by the United States Supreme Court in *Williams*.

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[16] *Id.* at 85. It should be noted, however, that subsequent to *Jones* but prior to *Williams*, the California Supreme Court retreated somewhat from its broad holding in *Jones*. In Prudhomme v. Super. Ct., 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970), the court held:

> [T]he principal element in determining whether a particular demand for discovery should be allowed is not simply whether the information sought pertains to an 'affirmative defense,' or whether defendant intends to introduce or rely upon the evidence at trial, but whether disclosure thereof conceivably might lighten the prosecution's burden of proving the case in chief. Although the prosecution should not be completely barred from pretrial discovery, defendant must be given the same right as an ordinary witness to show that disclosure of particular information could incriminate him.

Id. at 326, 466 P.2d at 677, 85 Cal. Rptr. at 133.

This change in position was brought about by what the court viewed as certain significant developments in the law since *Jones* was decided in 1962. These developments included an increasing emphasis placed by the United States Supreme Court upon the role played by the fifth amendment privilege in protecting the rights of the accused; the promulgation by the Supreme Court in 1966 of Fed. R. Crim. P. 16(c) which limited discovery to the reasonable disclosure of principal evidence; and the questionable constitutionality of alibi statutes since the United States Supreme Court had recently granted certiorari in Williams v. Florida which had upheld Florida's alibi statute against a claim that it violated an accused's fifth amendment rights. *Id.* at 323-25, 466 P.2d at 675-76, 85 Cal. Rptr. at 131-32.

Obviously, the Supreme Court's ultimate decision in *Williams* has shown that the concerns expressed by the California Supreme Court in *Prudhomme* were unfounded.

[17] Jones v. Super. Ct., 58 Cal. 2d at 63, 372 P.2d at 923, 22 Cal. Rptr. at 883.

It should be emphasized, however, that this waiver theory necessarily presupposes that only information which will be disclosed at trial would be discoverable. The rationale is clearly invalid for all other materials.

Another theory which avoids the self-incrimination issue is that the defendant, by requesting discovery from the prosecution, waives his privilege, and as a condition to receiving discovery, must permit discovery by the government. This rationale is implicit in Rule 16(b) of the Federal Rules of Criminal Procedure,[18] in which prosecutorial discovery is conditioned on the defendant first requesting discovery of documents, tangible objects, photographs, and reports.

The question, however, which arises under this theory is whether defense discovery can be conditioned on a waiver of the fifth amendment privilege.

It was partly for this reason that Justice Douglas opposed sending the Rules of Criminal Procedure to Congress. While not commenting on whether or not a fifth amendment violation is involved in prosecutorial discovery, he believed that if a violation is involved, then to condition defense discovery on a waiver of the privilege imposed a penalty on the exercise of the privilege.[19]

Justice Douglas' reasoning, however, was utilized by the district court in deciding *United States v. Fratello*.[20] Relying upon *Malloy v. Hogan*,[21] the court reiterated that an option which exacts a penalty upon the exercise of the fifth amendment privilege is impermissible. Further, the court defined penalty to mean the imposition of any sanction which makes the assertion of the fifth

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[18] *See* FED. R. CRIM. P. 16(b)(1)(A) which provides:

> [I]f the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant on request of the government shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies of portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

[19] *See* 39 F.R.D. 276 (1965) (statement in opposition to the Federal Rules of Criminal Procedure).

[20] 44 F.R.D. 444 (S.D.N.Y. 1968).

[21] 378 U.S. 1 (1963).

amendment costly.[22]

In response, the advocates of prosecutorial discovery argue that defense discovery under Rule 16(c) is not a constitutional right, but a statutory benefit. The burden placed on the defendant is attached to the exercise of the privilege of discovery, not to the exercise of a constitutional right. Thus, there would be no constitutional bar since the choice remains with the defendant to bar discovery altogether. This rationale was accepted recently by the Tenth Circuit Court of Appeals.[23]

All of the above rationales, however, have in fact been avoiding the self-incrimination issue. None has actually dealt with whether, waiver and avoidance theories aside, prosecutorial discovery actually infringes on the privilege.

In dealing with this issue, the privilege against self-incrimination should be balanced against the need for mutuality in criminal discovery. Formerly, precise pleadings informed the criminal defendant of the case against him. As these requirements were abandoned the need was felt for more information to be given the defendant to balance his rights against the superior investigative power of the state. Thus, the process of allowing defendants the privilege of discovery was initiated. This swung the balance in favor of the defendant, making surprise defenses common. Since the government often had no advance warning or information about this, the search for truth was frustrated. It was felt that the criminal case should not be thought of as a poker game but as a search for truth.[24] Therefore, any infringement upon the privilege against self-incrimination is justified by this need to ascertain the truth.[25]

This balancing of the self-incrimination privilege against competing interests is well underway in other areas besides criminal discovery. In *Harris v. New York*,[26] the United States Su-

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[22] United States v. Fratello, 44 F.R.D. at 447.

[23] *See* United States v. Bump, 605 F.2d 548 (10th Cir. 1979).

[24] *See, e.g.*, Williams v. Florida, 399 U.S. at 82.

[25] It should be noted, however, that most cases utilizing this justification have failed to rely upon it solely. Instead, they have also relied upon the waiver and avoidance theories. *See* Note, *The Self-Incrimination Privilege: Barrier to Criminal Discovery*, 51 CAL. L. REV. 135 (1963).

[26] 401 U.S. 222 (1971). This decision concerned the admissibility of a defen-

preme Court stated that the privilege against self-incrimination is not absolute, but must sometimes give way to the competing judicial interests in the search for truth.

Furthermore, statutes which compel a witness to testify but grant immunity or deny the use of his testimony against him, have long been recognized as a permissible encroachment on the fifth amendment.[27] Similarly, statutes requiring an automobile driver to stop and leave his name and address after an accident have also been recognized as a justified encroachment on the privilege against self-incrimination[28] as well as those requiring the keeping of records that may later be used in a criminal trial since there is a sufficient relation between the activity sought to be regulated and the public concern.[29]

Thus, in other areas, limitations on the self-incrimination privilege have been accepted if the interest involved outweighs the need for the privilege. Therefore, it can forcefully be asserted that in the area of prosecutorial discovery the need to make the criminal trial a search for truth justifies some encroachment on the privilege. The major issue left unsettled, however, is the scope of this permissible encroachment.

B. Due Process

Another major question with respect to prosecutorial discovery is the extent to which due process bars such discovery. Two Supreme Court decisions, however, have clearly held that due process does not preclude the kind of prosecutorial discovery permitted, for example, by alibi statutes.

In *Williams v. Florida*, the Court upheld Florida's notice of alibi statute against a due process attack. In justifying its holding, the Court placed reliance on what it perceived as two important interests. First, the state's interest in protecting itself against a surprise alibi defense was viewed as legitimate, given the ease

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dant's statement for impeachment purposes even though it had been obtained in violation of *Miranda* guidelines.

[27] King, *Immunity for Witnesses: An Inventory of Caveats*, 40 A.B.A.J. 377 (1969).

[28] Byers v. Justice Ct., 71 Cal. 2d 1039, 458 P.2d 465, 80 Cal. Rptr. 553 (1969).

[29] *See* Nelson v. County of Los Angeles, 362 U.S. 1 (1959); Berlain v. Bd. of Educ., 357 U.S. 399 (1958); Shapiro v. United States, 335 U.S. 1 (1948).

with which a defendant can fabricate one. Second, considerable emphasis was placed upon the need to make the criminal trial a search for truth. In this respect, the Court stated:

> The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as 'due process' is concerned, for the instant Florida rule, which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence.[30]

Also of primary importance to the decision was the fact that the alibi statute required the prosecution to undergo reciprocal discovery.[31]

In fact, this importance placed upon reciprocity in criminal discovery was underlined in the second major due process case of *Wardius v. Oregon*.[32] There, the state alibi statute in question required the defendant to give pretrial notice to the prosecution regarding his intention to introduce alibi evidence and the identity of his alibi witnesses. However, the statute made no reciprocal demands on the prosecution. This lack of reciprocity in the statute proved to be a fatal defect in the eyes of the Court.[33]

The Court, however, went beyond the narrow confines of alibi statutes in determining the requirements of due process in criminal discovery. It noted:

> The growth of such discovery devices is a salutory development which by increasing the evidence available to both parties, enhances the fairness of the adversary system . . . . [N]othing in the Due Process Clause precludes states from experimenting with systems of broad discovery designed to achieve the goals . . . .
>
> Although the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded . . . it does speak to the balance of forces between the accused and his accuser.[34]

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[30] Williams v. Florida, 399 U.S. at 82.
[31] *Id.* at 81.
[32] 412 U.S. 470 (1973).
[33] *Id.* at 472.
[34] *Id.* at 474.

Although *Williams* and *Wardius* related solely to alibi statutes, the language employed by the Court would also seem to delineate the scope of due process as it applies to broader prosecutorial discovery. In fact, one state case has interpreted *Williams* and *Wardius* as justifying a court's action in requiring a defendant to disclose the general nature of his defense and a list of general defense witnesses with accompanying statements.[35] Like *Wardius*, the case also emphasized the importance that a balance be struck between the discovery granted the defendant and that granted the prosecution.[36]

These cases, taken together, make it clear that due process does not generally relate to the right to discovery, but merely to the balance of discovery which must finally be achieved if discovery is permitted. This conclusion is reinforced by the fact that even state cases which have held that most prosecutorial discovery violates the privilege against self-incrimination concede that due process does not preclude such discovery.[37]

There is, however, one major exception to this general conclusion that due process does not relate to the right to discovery but merely to the balance required if discovery is utilized. In *Brady v. Maryland*,[38] the United States Supreme Court held that due process requires the prosecution to disclose exculpatory evidence to the defendant.[39] While this requirement pertains only to defense discovery, it raises some question about the validity of the waiver theory used to overcome the self-incrimination issue. According to this theory, if a defendant requests discovery from the prosecution, he is considered to have waived his right to claim the privilege. If, however, the information which the defendant requests is constitutionally required to be disclosed, the question then becomes whether he can be said to have waived his fifth amendment privilege by exercising another constitutional right. In fact, an earlier federal court case suggested that if the prosecution has material which the defense considers so crucial to its case

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[35] State v. Nelson, 14 Wash. App. 658, 545 P.2d 36 (1975).

[36] *Id.* at 665, 545 P.2d at 40.

[37] *See, e.g.*, Scott v. State, 519 P.2d 774 (Alaska 1974) wherein the court held that most prosecutorial discovery violates the state privilege against self-incrimination but expressed doubts about whether due process barred such discovery.

[38] 373 U.S. 83 (1963).

[39] *Id.* at 87.

that it would waive the privilege against self-incrimination, the prosecution may be under a *Brady* obligation to disclose it anyway.[40] This objection, however, appears to have been rejected by the Supreme Court in *Williams* and *Wardius*.

In general, therefore, due process is not a bar to prosecutorial discovery for it does not relate to the right to discovery but only to the amount of reciprocity and fairness which is involved. Clearly, most courts seem to regard with favor the enlarged scope of discovery because it aids the search for truth. Thus, the only question really impeding the widespread recognition of prosecutorial discovery is whether a defendant can be said to have waived his fifth amendment rights by requesting discovery from the prosecution, particularly when such a request pertains to exculpatory evidence.

C. *Work Product*

Another question raised by the advent of prosecutorial discovery is to what extent does the work product doctrine apply to criminal discovery. Long recognized in civil cases, the general doctrine was originally recognized and defined by the Supreme Court in *Hickman v. Taylor*.[41] There, the Court held that there was a qualified privilege from discovery of certain materials prepared by an attorney in anticipation of litigation.[42] While *Hickman* dealt with the doctrine in a civil context, the broad principles announced in that decision can easily be applied to criminal discovery as well.

Thus, the doctrine has been recognized in various state[43] and lower federal[44] criminal discovery cases and incorporated into the

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[40] *See* United States v. Fratello, 44 F.R.D. at 451.

[41] 329 U.S. 495 (1947).

[42] *Id.* at 508. The Court recognized that a lawyer must work with a certain degree of privacy in order to plan strategies, sift information and prepare legal theories without undue interference. Thus, the doctrine would protect such materials as interviews, statements, memoranda, correspondence, briefs, mental impressions and personal beliefs. *See id.* at 510-11.

[43] *See, e.g.*, State v. Bowen, 104 Ariz. 138, 449 P.2d 603 (1968) *cert. denied*, 396 U.S. 912 (1969); Peel v. State, 154 So. 2d 910 (Fla. Dist. Ct. App. 1963); State *ex rel.* Polley v. Super. Ct., 81 Ariz. 127, 302 P.2d 263 (1956).

[44] *See, e.g., In re* Grand Jury Proceedings, 473 F.2d 840 (8th Cir. 1973); *In re* Jerkeltoub, 256 F. Supp. 683 (S.D.N.Y. 1966).

Federal Rules of Criminal Procedure.[45] The Supreme Court has also recognized the applicability of the doctrine. In *United States v. Nobles*[46] it considered the doctrine to be even more vital in criminal cases because of the need for adequate safeguards to ensure the thorough preparation and presentation of each side of the case. The Court went on to point out, however, that the privilege is not absolute and can be waived. Thus, the Court held that the respondent had waived the privilege because an investigator had testified and contrasted his recollection of statements with that of prosecution witnesses.[47]

Despite the evident vitality of the work product doctrine, it has rarely been claimed in criminal discovery cases, primarily because most discovery does not invoke work product. Hence, the doctrine is not a significant impediment to broad prosecutorial discovery.

D. Attorney-Client Privilege

The attorney-client privilege has also traditionally been viewed as a bar to prosecutorial discovery based upon the belief that full and informed disclosure to an attorney is essential to the fact finding process and that clients will only make these necessary disclosures if they know that what they say will not be revealed.[48]

The privilege, however, applies only where necessary since it has the effect of withholding relevant information.[49] Thus, "[i]t protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privi-

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[45] *See* FED. R. CRIM. P. 16(b)(2) which provides:
[E]xcept as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses to the defendant, his agents or attorneys.

[46] 422 U.S. 225 (1975).

[47] *Id.* at 238. The Court did emphasize, however, that to waive the privilege a defendant must make testimonial use of the privileged material.

[48] Fisher v. United States, 425 U.S. 391 (1976).

[49] *Id.* at 403.

lege."[50] Additionally, only communications which were intended to be confidential are within the scope of the privilege.[51]

The privilege extends not only to the attorney and client but also to necessary intermediaries and agents through whom communications are made. Thus, reports made by a physician to whom a defendant is sent by his attorney for examination (as distinguished from advice and treatment) are within the scope of the privilege because such reports would be communications between the defendant and his attorney through the physician.[52]

Like any other privilege, the attorney-client privilege may also be waived. Furthermore, not only will express language constitute a waiver but also any conduct indicating an intent to waive will suffice. Hence, the client waives the privilege as to all consultations relating to the same subject when the attorney or his agent is called as a witness at trial.[53]

While the attorney-client privilege can preclude prosecutorial discovery, it, like the work product doctrine, clearly plays an incidental role in such discovery.

E. Power of Trial Courts

The final question presented by the growing use of prosecutorial discovery is the extent to which trial courts may utilize their broad discretionary powers to authorize discovery against a defendant in a criminal proceeding in the absence of express legislation authorizing such discovery. This question is of particular import in West Virginia since the supreme court of appeals has not been presented with the potential conflict between prosecutorial discovery orders and a defendant's constitutionally protected privilege against self-incrimination. However, precedent in both state and federal jurisdictions, when combined with West Virginia decisions permitting defense discovery, suggests the propriety of such discovery orders.

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[50] *Id.*

[51] 8 WIGMORE, EVIDENCE § 2292 (McNaughton rev. ed. 1961).

[52] Jones v. Super. Ct., 58 Cal. 2d at 61, 372 P.2d at 921-22, 22 Cal. Rptr. at 881-32. However, if the physician were to be called at trial, the attorney-client privilege would not apply.

[53] 8 WIGMORE, EVIDENCE § 2327 (McNaughton rev. ed. 1961).

For example, *Jones v. Superior Court*,[54] the first case permitting extensive prosecutorial discovery, was decided without the benefit of legislation specifically authorizing the trial court to grant discovery to either the defendant or the prosecution. Nonetheless, the California Supreme Court noted the extensive discovery rights granted by trial courts to defendants and proceeded to allow prosecutorial discovery of evidence to be introduced by the defendant in support of an affirmative defense.

Similarly, when presented with the same issue, the Washington Supreme Court stated: "[t]his state has long recognized the inherent power of the trial court to grant discovery. . . . This inherent power, based on trial administration, is not limited to that which benefits the defendant."[55] Ten years later, another Washington court held that a trial court had not abused its discretion in excluding evidence when the defense failed to comply with a discovery order. The court stated:

> [W]e now consider whether that court abused its discretion by finding defendants in contempt and ordering imprisonment until answer. Trial judges have the inherent power to resort to contempt procedures for enforcement of their orders . . . . Having properly held defendants in contempt, the coercive sanctions to be imposed lay within the sound discretion of the trial court,' whose action will not be disturbed absent a clear showing of an abuse of that discretion . . . . The trial court's orders finding the defendants in contempt and confining them to jail until compliance were appropriate in the circumstances and did not constitute an abuse of discretion. . . .[56]

The Supreme Court of Indiana has likewise been forced to decide a case concerning prosecutorial discovery without the benefit of an express legislative declaration. In *State ex rel. Keller v. Criminal Court*,[57] the trial court had granted both the prosecution and the defendant extensive discovery. In addition to being required to appear in a lineup, put on clothing for identification and perform other physical acts, the defendant was also required to provide the prosecution with medical or scientific reports in his possession and with notice of intent to raise any defense, together

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[54] Jones v. Super. Ct., 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962).
[55] State v. Grove, 65 Wash. 2d 525, 527, 298 P.2d 170, 172 (1965).
[56] State v. Nelson, 14 Wash. App. 658, 662-63, 545 P.2d 36, 40-41 (1975).
[57] 262 Ind. 420, 317 N.E.2d 433 (1974).

with the names and addresses of witnesses he intended to call, summaries of their statements, and their criminal records. The defendant was also required to produce any document, photograph or tangible object he intended to introduce into evidence or use for impeachment purposes. Disclosure by the state was likewise extensive. The prosecution was required to produce the names, addresses, and statements of its prospective witnesses, exculpatory material, grand jury minutes containing testimony of prospective witnesses, reports of experts, papers or tangible objects to be introduced and records of prior convictions of state witnesses.

In deciding the propriety of the trial court's action, the court held that:

> As a matter of state law . . . a trial court had the inherent power to balance discovery privilege between the parties. Thus, if any statute should deny of fail to provide for full discovery, within constitutional safeguards, the trial court may balance the discovery procedure regardless of any omission or prohibition in the statute. . . . [A] trial court may, sua sponte, affirmatively order discovery. We have specifically so held: 'Discovery may be provided for by statute, court rule, or granted by the inherent power of the trial court,' (citation omitted). The object of a trial is the discovery of the truth. A trial judge has the responsibility to direct the trial in a manner which facilitates the ascertainment of the truth. The power to order discovery is 'grounded in the inherent power of the trial court to guide and control the proceedings' (citation omitted).[58]

The court went on to point out that the discovery order issued by the trial court in the case may indeed have gone beyond that which was traditionally granted in Indiana at that time, but that "[t]o assert that a court's action is not traditional is not a sound argument. . . . When a trial judge orders discovery, the party so ordered must do more than point out that the order is unusual or innovative in order to prevail in prohibiting it."[59]

Federal courts have also suggested that judges should not feel restricted by express provisions allowing discovery. In this con-

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[58] *Id.* at 421-22, 425, 317 N.E.2d at 434-35, 438.

[59] *Id.* at 421-22, 317 N.E.2d at 434-35.

nection a district court stated that a federal trial court:

> [I]s not confined solely to the discovery techniques and parameters laid out in the Federal Criminal Rules. Prior to the first promulgation of the Criminal Rules in 1946, Federal Criminal Procedure in the District Courts grew out of the inherent power of the Courts to develop their own procedure. The Federal Rules of Criminal Procedure were not designed to and do not entirely supplant this fundamental authority and residual power of the Court. . . . [t]he question as to when the Court should permit this discovery is essentially one of policy, not of power.[60]

The situation, however, is somewhat different in West Virginia than in the above cited state jurisdictions. Statutorily, a defendant is entitled to discovery of his statements, reports of physical and mental examinations or scientific tests, and books, papers, or tangible objects seized from or belonging to him.[61] Thus, there is an express authorization for some discovery. In 1978, however, the supreme court of appeals followed the trend established by federal courts by extending the right of defense discovery beyond that provided in the statute to include production of any written statements made by prosecution witnesses before cross-examination, together with an opportunity to examine these statements.[62] Prior to that, the court had also recognized that the prosecution had a constitutional duty to disclose any known exculpatory information to the defendant even in the absence of a defense motion.[63]

The court has apparently adopted the reasoning present in those state cases justifying prosecutorial discovery orders on the court's inherent power. In 1975 it noted that "[h]istorically, discovery in criminal cases has been largely within the discretion of the trial judge. . . ."[64]

Thus, it appears that West Virginia is willing to follow the trend toward broader discovery in criminal cases. In fact, the court said as much when it stated: "[i]n recent years this Court

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[60] United States v. Bender, 331 F. Supp. 1074, 1075-76 (C.D. Calif. 1971).
[61] W. VA. CODE § 62-1A-1(3) (1977 Replacement Vol.).
[62] State v. Sette, 242 S.E.2d 464 (W. Va. 1978).
[63] State v. Cowan, 156 W. Va. 827, 197 S.E.2d 641 (1973).
[64] State v. Dudick, 213 S.E.2d 458, 463 (W. Va. 1975).

has tended to look with increasing favor upon the liberal use of discretion in criminal discovery . . . ."[65] Nonetheless, prosecutorial discovery has, up to the adoption of the new Rules of Criminal Procedure, been limited. That is not to say, however, that a trial court's discretion to allow broader prosecutorial discovery has been proscribed. In any event the West Virginia Rules of Criminal Procedure will alleviate much of this uncertainty for they contain provisions permitting prosecutorial discovery. This fact indicates that such discovery is viewed favorably by the supreme court of appeals.

III. Conclusion

With the adoption of the new Rules of Criminal Procedure in West Virginia, prosecutorial discovery will become commonplace in the future. This is only proper because our system of justice is only served when a criminal trial is a search for truth and not a contest of surprises. Yet, even with the new rules, some questions will remain as to the extent of discovery permitted and the conditions under which it will be granted.

[65] *Id.*