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The Conundrum of Criminal Discovery: Constitutional Arguments, ABA Standards, Federal Rules, and Kentucky Law

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NOTES

THE CONUNDRUM OF CRIMINAL DISCOVERY: CONSTITUTIONAL ARGUMENTS, ABA STANDARDS, FEDERAL RULES, AND KENTUCKY LAW

I. INTRODUCTION

A. *Historical Background*

> To require the disclosure to an adversary of the evidence that is to be produced, would be repugnant to all sportsmanlike instincts. Rather permit you to preserve the secret of your tactics, to lock up your documents in the vault, to send your witness to board in some obscure village, and then, reserving your evidential resources until the final moment, to marshal them at the trial before your surprised and dismayed antagonist, and thus overwhelm him.[1]

The traditional approach to trial advocacy and adjudication, appropriately called the "sporting theory of justice" by Dean Roscoe Pound,[2] has contributed more than anything else to resistance to pretrial criminal discovery and still governs the American criminal courtroom. Lately, however, this approach has come under increasing attack, often from some of today's leading jurists.[3] In order to understand this criticism and to outline suggested improvements, this note will set forth the rationale for pretrial criminal discovery, will discuss the constitutional issues it has raised in the courts, and will compare present Kentucky law on criminal discovery with the ABA Standards on Discovery[4] and the federal rules.[5]

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[1] 6 J. WIGMORE, EVIDENCE § 1845, at 375-76 (3d ed. 1940).

[2] 5 R. POUND, JURISPRUDENCE 564 (1959), *citing* 6 J. WIGMORE, EVIDENCE 375 (3d ed. 1940). Pound credits Wigmore with coining this phrase.

[3] Williams v. Florida, 399 U.S. 78 (1970); Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?* 1963 WASH. U.L.Q. 279, 292 (1963) [hereinafter cited as Brennan]; Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228 (1964).

[4] AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL (Approved Draft 1970) [hereinafter cited as ABA STANDARDS, DISCOVERY]. The ABA Standards have already been prepared as model rules for state courts. *See* AMERICAN BAR ASSOCIATION, PATTERN RULES OF COURT AND CODE PROVISIONS, 118-135 (Rev. ed. 1976).

[5] For a thorough article which examines the present federal rules of criminal

Pretrial criminal discovery did not exist at common law.[6] In England it was denied because of a fear that liberal discovery would "subvert the whole system of criminal law."[7] Since this fear was expressed in 1792, however, England has transformed its system of preliminary inquiry into a process replete with opportunities for discovery.[8] At the modern preliminary hearing, an English prosecutor must introduce not only enough evidence to establish "probable cause," but also all evidence he intends to introduce at trial. Furthermore, the prosecution has a continuing duty to notify the defense of any additional evidence it proposes to introduce. The defendant, on the other hand, is under no duty to disclose.[9]

The American approach to pretrial criminal discovery has not developed as liberally and is still a long way from requiring complete disclosure before trial. Until recently, in fact, American courts, including Kentucky's, were even hostile to pretrial criminal discovery[10] although such an attitude seems a strange

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procedure on discovery with more detail than this Note will attempt see Comment, *Amendments to the Federal Rules of Criminal Procedure—Expansion of Discovery*, 66 J. CRIM. L.&C 23 (1975) [hereinafter cited as Comment, *Expansion of Discovery*]. *See also* Comment, *Pretrial Discovery Under the Proposed Amendments to the Federal Rules of Criminal Procedure*, 46 MISS. L.J. 302 (1975).

[6] 2 F. WHARTON, CRIMINAL EVIDENCE § 671 (12th ed. 1955); 6 J. WIGMORE, EVIDENCE § 1859a (3d ed. 1940).

[7] King v. Holland, 100 Eng. Rep. 1248, 1249 (K.B. 1792). In this case the Bench held not only that the defendant had no right to inspect a report of the board of inquiry but also that the court did not have even discretionary power to grant such a request.

> It is clear that neither at common law, or under any of the statutes, is the defendant entitled as a matter of right, to have his application granted. And if we were to assume a discretionary power of granting this request, it would be dangerous in the extreme, and totally unfounded on precedent. *Id.* at 1250.

[8] Actually as early as 1833 the English court had begun to reject the rationale of *Holland*. *See* Comment, *Pretrial Disclosure in Criminal Cases*, 60 YALE L.J. 626, 627, at n. 7 (1951) *citing* Regina v. Colucci, 176 Eng. Reprints 46 (1861); Rex v. Harrie, 172 Eng. Reprints 1165 (1833).

[9] D. KARLEN, ANGLO-AMERICAN CRIMINAL JUSTICE 158-161 (1967); Louisell, *Criminal Discovery: Dilemma Real or Apparent*, 49 CALIF. L. REV. 56, 64-67 (1961) [hereinafter cited as Louisell].

There are, however, two limitations to discovery in English criminal law: (1) The preliminary hearing is available only in cases tried by indictment, and (2) discovery by the defendant is limited to admissible evidence which the prosecutor intends to present at trial. Louisell, at 65.

[10] The trial, when the issue is joined, is not a friendly recitation, but a real trial. No morbid sentiment or sympathy for one charged with crime should overshadow the rights of the public. In these days criminals are both

contrast to both the Kentucky and Federal Rules of Civil Procedure which provide for very liberal discovery in civil cases.[11] Certainly no rules of criminal procedure have adopted the sweeping scope of the civil rules nor has pretrial criminal discovery ever been held to come within the constitutional requirement of due process.[12]

A breakdown in this traditional resistance to pretrial criminal discovery, however, can be discerned in several recent developments. In two cases, the United States Supreme Court, although still acknowledging that discovery in criminal cases is not required by the Constitution, has encouraged the development of more liberal discovery rules and statutes, provided such discovery is reciprocal.[13] In addition, discovery in federal cases has been broadened both by the adoption of the new Federal Rules of Criminal Procedure (hereinafter referred to as Federal Rules) on pretrial criminal discovery.[14] Lastly, the promulgation of the American Bar Association's standards[15] for liberal discovery in criminal cases represents a rejection of the traditional "sporting theory of justice." As these develop-

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skilled and cunning, and it is a contest between the people and the criminals for the mastery. Neither the rules of courtesy, or supposed equitable considerations, should be allowed to subvert the practice sanctioned by long experience. State v. Rhoads, 91 N.E. 186, 192 (Ohio 1910).

See also Evans v. Commonwealth, 19 S.W.2d 1091, 1093 (Ky. 1929) ("A litigant need never be surprised when his adversary proves his case."); Brawner v. Commonwealth, 344 S.W.2d 833, 836 (Ky. 1961) ("It should always be anticipated that the opposing party intends to prove his case with whatever means are available.")

[11] FED. R. CIV. P. 16; KY. CIV. R. 26-37; *See* KY. REV. STAT. § 447.151 (1975) [hereinafter cited as KRS].

[12] Moore v. Illinois, 408 U.S. 786 (1972); Leland v. Oregon, 343 U.S. 79 (1952) (defendant denied access to his own confessions). *But see* Nakell, *The Effect of Due Process on Criminal Defense Discovery*, 62 KY. L.J. 58, 90 (1973) in which the author argues that the "due process clause provides the cornerstone for criminal defense discovery . . . ." It should also be noted that the sixth amendment, which requires that "the accused . . . be informed of the nature and cause of the accusation . . . ." means that the defendant must have enough knowledge to prepare an adequate defense. Kampfe & Dostal, *Discovery in the Federal Criminal System*, 36 MONT. L. REV. 189, 191 (1975) [hereinafter cited as Kampfe, *Discovery*]. One commentator has argued that this clause may be a proper legal vehicle for defendants claiming a right to pretrial discovery. Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 184 (1974) [hereinafter cited as Westen, *Compulsory Process*].

[13] Wardius v. Oregon, 412 U.S. 470 (1973); Williams v. Florida, 399 U.S. 78 (1970).

[14] The focus of this Note will be on FED. R. CRIM. P. 12, 12.1, 12.2 and 16 (effective December 1, 1975).

[15] ABA STANDARDS, DISCOVERY, *supra* note 4.

ments indicate, the law of criminal discovery has become one of the most rapidly expanding areas of criminal law today. This evolution will certainly have an effect on Kentucky law. In responding to these developments the courts and bar of Kentucky should recognize that while the desirability of liberal pretrial criminal discovery is well established,[16] the scope of discovery as well as sanctions for noncompliance are the subjects of continuing and energetic debate.

B. *The Polemics on Broader Criminal Discovery*

In 1970 the American Bar Association, motivated by practical as well as ideological concerns, proposed the most liberal criminal discovery standards considered to date.[17] Liberal discovery was believed necessary not only to ensure the determination of truth and the equitable administration of justice, but also "to lend more finality to criminal dispositions, to speed up and simplify the process, and to make more economical use of resources."[18] These standards rejected a "grudging" attitude toward pretrial criminal discovery and embraced instead a standard which allows "disclosure of nearly everything, subject to certain . . . safeguards as they are needed in the particular case."[19]

Proposals such as the ABA Standards calling for broadened discovery generally proceed from a recognition of the state's legitimate and vital interest in the fair administration of justice, the integrity of the proceedings themselves, the ascertainment of truth, the prevention of trial error, and the finality of its criminal cases.[20] The basic premise underlying the

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[16] 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE §§ 252, 500 (1969).

[17] ABA STANDARDS, DISCOVERY, *supra* note 4.

[18] *Id.* at 2. The ABA standards also provide for procedures which would insure adherence to the discovery rules. Although not within the scope of this Note, it should be pointed out that among the most innovative of those procedures is the "omnibus hearing" in which the court hears all motions, demurrers, and other requests prior to trial and goes through a check list with the attorneys for each side. This guarantees that all necessary matters and potential post-conviction issues have been properly met. ABA STANDARDS, DISCOVERY, *supra* note 4, at § 5.3, p. 114, Appendix C: Checklist for Action at 138-144; *cf.* R. NIMMER, PROSECUTOR DISCLOSURE AND JUDICIAL REFORM (1975); Clark, *The Omnibus Hearing in State and Federal Courts*, 59 CORNELL L. REV. 761 (1974); Miller, *The Omnibus Hearing—An Experiment in Federal Criminal Discovery*, 5 SAN DIEGO L. REV. 293 (1968).

[19] ABA STANDARDS, DISCOVERY, *supra* note 4, at 40.

[20] NATIONAL CONFERENCE OF TRIAL JUDGES, THE STATE TRIAL JUDGE'S BOOK 245 (2d

argument for discovery in any case, criminal or civil, is that "truth is best revealed by a decent opportunity to prepare in advance of trial."[21] Maximum exchange of information will better serve the ends of justice by allowing the parties to prepare their cases thoroughly and reduce the chance of surprise at trial.[22] As one of the leading proponents of criminal discovery, California Justice Roger Traynor, explains: "The truth is most likely to emerge when each side seeks to take the other by reason rather than by surprise. The more open the process for eliciting it, the less need there is of surprise."[23]

Proponents of liberal discovery further argue that because the defendant is presumed innocent, it must be assumed that he is ignorant of the charge and the grounds on which it is based.[24] Even if the defendant were actually at the scene of the crime or in some way involved, he might not have a clear recollection of the circumstances or even his own conduct because of confusion, alcohol, drugs, or even the stress and anxiety caused by the excitement.[25] Yet without pretrial discovery, an

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ed. 1969) [hereinafter STATE TRIAL JUDGE'S BOOK].

[21] State v. Johnson, 145 A.2d 313, 315 (1958).

[22] For law review articles in favor of liberal criminal discovery see generally Rice, *Criminal Defense Discovery: A Prelude To Justice or an Interlude for Abuse?*, 45 MISS. L.J. 887 (1974); Shatz, *California Criminal Discovery: Eliminating Anachronistic Limitations Imposed on the Defendant*, 9 U. SAN. FRAN. L. REV. 259 (1974); Moore, *Criminal Discovery*, 19 HAST. L.J. 865 (1968); Note, *Pretrial Criminal Discovery: The Need for Expansion*, 35 U. CIN. L. REV. 195 (1966); Comment, *The Need for Liberalized Rules of Discovery in Criminal Procedure*, 49 MARQ. L. REV. 736 (1966); *Criminal Law —Discovery in Criminal Cases, Symposium on Legislation*, 18 VAND. L. REV. 1640 (1965); Everett, *Discovery in Criminal Cases—In Search of a Standard*, 1964 DUKE L.J. 477; Brennan, *supra* note 3; Krantz, *Pretrial Discovery in Criminal Cases: A Necessity for Fair and Impartial Justice*, 42 NEB. L. REV. 127 (1963); *Developments in the Law—Discovery*, 74 HARV. L. REV. 940 (1961); Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293 (1960); Note, *Pretrial Discovery in Criminal Cases*, 60 YALE L.J. 626 (1951).

[23] Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228, 249 (1964).

[24] United States v. J. M. Huber Co., 179 F. Supp. 570, 573 (S.D.N.Y. 1959). *See also* United States v. Tanner, 279 F. Supp. 457, 474 (N.D. Ill. 1967); United States v. Smith, 16 F.R.D. 372 (W.D. Mo. 1954).

[25] Discovery of the government's evidence of relevant and incriminating statements made by the defendant to police is of the utmost importance to the preparation of the defense as it must be kept in mind that given the traumatic circumstances of arrest the memory of a defendant as to exactly what occurred may well be hazy and defective. Even where a defendant's memory is crystal clear, it is not every defendant who chooses to tell his own attorney all that he remembers.

attorney may have no knowledge of the facts other than what he learns from his client and so may be unable to advise his client properly during plea bargaining.[26] In fact, because pretrial discovery can be useful in persuading defendants to plead guilty and because courts rely heavily on guilty pleas to lighten over-crowded dockets,[27] prosecutors often allow informal pretrial discovery even though this is not required.[28]

Furthermore, pretrial discovery promotes judicial economy by clarifying issues, thus avoiding confusion and delay caused by continuances during the trial itself. Instead of having knotty legal problems sprung on the defense counsel and perhaps the trial judge by the introduction of surprise evidence, pretrial discovery can bring such issues to the forefront early. This allows time for additional research and deliberation on the admissibility of the evidence at trial[29] and also protects a judgment from post conviction attack by insuring "that all the relevant constitutional questions were either resolved or

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> Moreover, a principal purpose of discovery is to advise defense counsel what the defendant faces in standing trial: it permits a more accurate evaluation of the factors to be weighed in considering a disposition of the charges without trial. While we cannot know whether such disclosure would in this case have led to disposition without trial, we do know that such disclosure does result in such dispositions in many cases. United States v. Lewis, 511 F.2d 798, 802 (D.C. Cir. 1975).

[26] JOINT COMMITTEE ON CONTINUING LEGAL EDUCATION, THE PROBLEM OF DISCOVERY IN CRIMINAL CASES 4-5, 59 (1961).

[27] Most jurisdictions have a guilty plea rate of higher than 60 percent while a few have rates as high as 95 percent. Comment, *Preplea Discovery: Guilty Pleas and the Likelihood of Conviction at Trial*, 119 U. PA. L. REV. 527 (1971). *See also* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, THE COURTS 9 (1967) *citing* ABA, PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY (Tent. Draft 1967); 8 MOORE, FEDERAL PRACTICE ¶11.02[1] (2d ed. 1968).

[28] This procedure of informal disclosure in lieu of hearings accounts for the large number of waivers of indictment and actually decreases the court's burden in many instances by encouraging guilty pleas. Many times a disclosure of the documentary evidence has brought a guilty plea.

Hearing on the United States Commissioner System Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 89th Cong., 1st Sess., pt. 2, at 162, 164 (1965).

[29] STATE TRIAL JUDGE'S BOOK, *supra* note 17, at 245. *See also* PRESIDENT'S COMMISSION, THE CHALLENGE OF CRIME 139 (1967):

> A partial answer to the great number of habeas corpus proceedings is the improvement of trials. This means not only insuring that constitutional rights are protected but that the protection is fully documented on the record. Judges should take pains to insure that constitutional issues present in the case are confronted and directed.

knowingly waived at the original trial . . . ."[30] Thus, pretrial discovery insures not only the integrity of the verdict but its finality as well.

Early discovery may also alert defense counsel to issues which might otherwise have been overlooked and give him ample opportunity to respond to the situation intelligently. This should reduce post trial claims of ineffective assistance of counsel.[31] In addition, pretrial discovery would insure effective confrontation of the prosecution's witnesses[32] by giving the defendant an opportunity to examine the witnesses' background for possible bias before trial. Moreover, this would reduce the time needed by the defense on cross-examination and expedite the trial by rendering extensive fishing expeditions unnecessary.

Those opposed to liberal criminal discovery fear that broad pretrial disclosure would result in the tampering with evidence, perjury, and the intimidation of witnesses.[33] As Dean Pound has framed the issue, it is the "problem of, on the one hand, unfair surprise to a party by unexpected evidence which he is not at the moment prepared to meet, and, on the other hand, danger of falsification of means of meeting it if the one who offers it is required to divulge it before trial."[34]

One's immediate reaction is to analyze civil cases to ascertain the result of accepted liberal discovery. The experience in the civil arena has proven that broad discovery does not encourage falsification and perjury but rather results in better

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[30] Zagel & Carr, *State Criminal Discovery and the New Illinois Rules*, 1971 U. ILL. L.F. 557, 562 [hereinafter cited as Zagel & Carr, *State Criminal Discovery*]; *See also* STATE TRIAL JUDGE'S BOOK, *supra* note 17, at 245.

[31] ABA STANDARDS, DISCOVERY, *supra* note 4, at 5. This may be of particular importance here because the Sixth Circuit measures effective assistance of counsel by a relatively high standard, that of "a reasonably competent criminal trial attorney." Beasley v. United States, 479 F.2d at 1124 (6th Cir. 1973).

[32] Kampfe, *Discovery, supra* note 12, at 191, *cf.* Douglas v. Alabama, 380 U.S. 415, 420 (1964).

[33] For articles opposing liberal criminal discovery see generally Barrett, Danger Ahead for Adversary System, TRIAL MAGAZINE 19, 21 (Dec. 66-Jan. 67); Panel on Pretrial Discovery in Criminal Cases, 31 BROOKLYN L. REV. 320 (1965). Flannery, Speech delivered to Symposium at the Judicial Conference of the District of Columbia Circuit, *Prosecutor's Position's Arguments and Illustrations Against Liberalization of Defense Discovery Rules, Need for Prosecutor's Discovery of Specific Defenses (Alibi, Insanity, etc.) printed in* 33 F.R.D. 74 (1963), [hereinafter cited as Flannery].

[34] 5 POUND, JURISPRUDENCE 563 (1959).

preparation and more thorough and effective cross-examination.[35] The pursuit of truth is furthered since witnesses subjected to the fire of effective, knowledgable cross-examination cannot as easily deceive.

Chief Justice Arthur Vanderbilt, however, rejected any comparison between criminal and civil trials when he stated that perjury and witness intimidation are far more likely in criminal than civil cases.[36] Another jurist, Justice William

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[35] Facilitation of perjury has been a bogey man of discovery for over a hundred years. No evidence can be produced conclusively to prove or disprove it, and the consensus among lawyers is to reject it. This investigation disclosed the variety of ways in which lawyers use discovery to thwart perjury. Defendants customarily take a deposition and make a physical examination of the plaintiff immediately after suit is filed to freeze his account both of the accident and of his injuries before he has learned too much about what facts will support his recovery. The answers to interrogatories and admissions, documents obtained by motions to produce, and testimony on deposition are checked against one another and against testimony at the trial to outwit the perjurer.

Speck, *The Use of Discovery in the United States District Courts*, 60 YALE L.J. 1132, 1154 (1951) [footnotes omitted]. *Cf.* Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293, 311 (1960).

There have been many assertions that liberal discovery invites perjury and fabrication, but virtually no tangible proof or documentation of these assertions. What meager statistical evidence there is suggests that perjury is a very slight danger . . . . Indeed, it seems quite as likely that better knowledge on both sides concerning the material evidence, and an awareness on the defendant's part how much of the case is recorded on paper, would serve to deter rather than encourage perjury and fabrication. Brennan, *supra* note 3, at 290, n. 39.

[36] Defendant argues that in keeping with the modern trend toward liberal discovery in civil proceedings we should grant him the unqualified right to an inspection of all papers and other documents in the possession of the State . . . . Such an argument compeltely ignores the fundamental difference between civil and criminal proceedings . . . . In criminal proceedings long experience has taught the courts that often discovery will lead not to honest fact-finding, but on the contrary to perjury and the suppression of evidence. Thus the criminal who is aware of the whole case against him will often procure perjured testimony in order to set up a false defense . . . . Another result of full discovery would be that the criminal defendant who is informed of the names of all of the State's witnesses may take steps to bribe or frighten them into giving perjured testimony or into absenting themselves so that they are unavailable to testify. Moreover, many witnesses, if they know that the defendant will have knowledge of their names prior to trial, will be reluctant to come forward with information during the investigation of the crime . . . . All these dangers are more inherent in criminal proceedings where the defendant has much more at stake, often his own life, than in civil proceedings. The presence of perjury in criminal proceedings today is extensive despite the efforts of the courts to eradicate it and constitutes a

Brennan, has retorted that he is not persuaded by the "old hobgoblin perjury, invariably raised with every suggested change in procedure to make easier the discovery of the truth."[37] Brennan goes on to argue that even if such dangers do exist and abuses are threatened, safeguards against those abuses should be the aim, not denial of discovery.[38] In this argument he is joined by the usually conservative Dean Wigmore who wrote:

> The possibility that a dishonest accused will misuse such an opportunity is no reason for committing the injustice of refusing the honest accused a fair means of clearing himself. That argument is outworn; it was the basis (and with equal logic) for the one-time refusal of the criminal law . . . to allow the accused to produce any witnesses at all.[39]

After sifting through all the polemics on pretrial criminal discovery, it becomes clear that the fundamental issue is the balancing of advantages and disadvantages between the defense and the prosecution. The defense-oriented argue that pretrial discovery of the prosecutor's case is necessary to put the accused on an equal footing with the state at trial. The defendant, they point out, does not have access to any resource approaching the state's modern police force and vast investiga-

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very serious threat to the administration of criminal justice and thus to the welfare of the country as a whole.

State v. Tune, 98 A.2d 881, 884 (N.J. 1953) (C.J. Vanderbilt). *But see Developments in the Law-Discovery*, 74 HARV. L. REV. 940, 1051-63 (1961).

[37] Brennan, Speech delivered to symposium at the Judicial Conference of the District of Columbia Circuit, *Discovery in Federal Criminal Cases, printed in* 33 F.R.D. 47, at 62 (1963) [hereinafter cited as Brennan, *Remarks on Discovery*]. *See also* United States v. Projansky, 44 F.R.D. 550 (S.D.N.Y. 1968).

[38] Brennan, *Remarks on Discovery*, *supra* note 37, at 65. *See also* State v. Tune, 98 A.2d 881 (N.J. 1953) (Brennan, J. dissenting).

> . . . Certainly without actual evidence and upon conjecture merely, and in the face of the contrary proof of our experience in civil cases, we ought not in criminal cases, where even life itself may be at stake, forswear in the absence of clearly established danger a tool so useful in guarding against the chance that a trial will be a lottery or mere game of wits and the result at the mercy of the mischiefs of surprise. We must remember that society's interest is equally that the innocent shall not suffer and not alone that the guilty shall not escape. Discovery, basically a tool for truth, is the most effective device yet devised for the reduction of the aspect of the adversary element to a minimum.

[39] 6 J. WIGMORE, EVIDENCE § 1863, at 488 (3d ed. 1940).

tory apparatus.[40] Moreover, the state can rely upon search warrants and secret grand jury investigations to gather evidence before trial. In contrast, the defendant may actually be barred from gathering facts because he or she is in custody[41] or simply cannot afford to pay for an investigation.[42] The state has the added advantage of being first at the scene of a crime, and therefore gains exclusive possession of most of the physical evidence. Furthermore, investigators wearing the cloak of governmental authority can get voluntary cooperation from potential witnesses when the defendant cannot.[43] These prosecutorial pretrial advantages, augmented by the loosening of pleading and proof standards, argues one commentator, require the introduction of compensatory safeguards for the accused in the form of broad pretrial discovery.[44]

The prosecution-oriented contend that the defendant has enough protections in the presumption of innocence, the exclusionary rule, and the prosecution's burden of proving its case

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[40] Fairly clearly, pretrial discovery by the prosecution is far-reaching. And it cannot in any sense be said to be matched by what is available to the defendant or by what he can keep from the prosecution—even when his "immunity" from self-incrimination is thrown into the scales. While the possibility that the defendant may produce a hitherto undisclosed witness or theory of defense is always present, the opportunity for surprise is rendered practically illusory by the government's broad investigatory powers and by the requirement in many states that the defenses of alibi and insanity must be specially pleaded. The sum of the matter is that the defendant is not an effective participant in the pretrial criminal process. It is to the trial alone that he must look for justice. Yet the imbalance of the pretrial period may prevent him from making the utmost of the critical trial date. And the trial, in turn, has been refashioned so that it is increasingly unlikely that it will compensate for the imbalance before trial.

Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1192 (1960) [hereinafter cited as Goldstein].

[41] JOINT COMMITTEE ON CONTINUING LEGAL EDUCATION, THE PROBLEM OF DISCOVERY IN CRIMINAL CASES 4 (1961).

[42] It has been argued that an indigent has a right not only to counsel but also to investigation in his behalf. *The Indigent's Right to an Adequate Defense: Expert and Investigational Assistance in Criminal Proceedings*, 55 CORNELL L. REV. 632, 632-637 (1970). Because public defender systems such as the one in Kentucky often have their own investigators, however, the disadvantage of not having access to independent investigation will fall not on indigents but on middle or lower class defendants who are not eligible for public defender assistance but who cannot afford the high expense of private investigation. *See also* Note, *Right to Aid in Addition to Counsel for Indigent Criminal Defendants*, 47 MINN. L. REV. 1054 (1963).

[43] Comment, *Expansion of Discovery, supra* note 5, at 41-42, n. 132.

[44] Goldstein, *supra* note 40, at 1199.

beyond a reasonable doubt.[45] Finally and most importantly they argue that because the defendant's fifth amendment privilege protects him from self-incrimination, he could not be forced to produce evidence before trial and would thus be in a position to surprise the prosecution. Pretrial discovery would be a "one-way street" resulting in an imbalance in favor of the accused[46] and making "the prosecutor's task almost insurmountable."[47] This fear was put to rest, however, with the Supreme Court's decision in *Williams v. Florida*[48] which held that the fifth amendment does not bar requiring pretrial disclosure of the defense.

II. CONSTITUTIONAL PROBLEMS ENCOUNTERED BY PRETRIAL CRIMINAL DISCOVERY

A. *The Fifth Amendment v. Prosecutorial Discovery*

The concept of *nemo tenetur prodere seipsum*, "no man is bound to accuse himself,"[49] is embodied in the fifth amendment of the Constitution,[50] which, in spite of a great deal of

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[45] In an oft-quoted passage Judge Learned Hand once noted:

> 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 fouly, I have never been able to see. No doubt grand juries err and indictments are calamities to honest men, but we must work with human beings and we can correct such errors only at too large a price. Our dangers do not lie in too little tenderness to the accused. Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archiac formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.

United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923). *See also* text accompanying note 98, *infra*, and the recent United States Supreme Court opinion criticizing the exclusionary rule. Stone v. Powell, -U.S.-, 96 S.Ct. 3037 (1976).

[46] Flannery, *supra* note 33.

[47] State v. Tune, 98 A.2d 881, 885 (N.J. 1953).

[48] 399 U.S. 78 (1970).

[49] L. LEVY, ORIGINS OF THE FIFTH AMENDMENT 3 (1968); for another readable but thorough account of the historical development of the fifth amendment see Harris, *Annals of Law: Taking the Fifth* (Part II), THE NEW YORKER 43-100 (April 26, 1976). *Cf.* Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763 (1935); Note, *Self-Incrimination—Historical Background of the Doctrine*, 44 KY. L.J. 124 (1956).

[50] "No person . . . shall be compelled in any criminal case to be a witness against

criticism,[51] remains a vital cornerstone of the American criminal justice system.[52] Nevertheless, its protection is not limitless; the accused is protected only from being "compelled" to give "incriminating testimony."[53] In *Williams v. Florida*,[54] a case challenging the Florida notice of alibi rule, the United States Supreme Court confronted the issue of whether pretrial discovery of the accused's defense by the prosecution is a violation of the fifth amendment privilege against self-incrimination. The Florida rule[55] required that a defendant intending to rely on an alibi defense give the prosecution notice and a list of witnesses he proposes to call to establish that defense. In *Williams*,[56] the Supreme Court upheld the notice of alibi requirement and accepted the theory that fairness to both sides requires mutual discovery:

> 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.[57]

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himself . . . ." U.S. CONST. amend. V.

[51] *See* L. MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT (1959); Baker, *Self-Incrimination: Is the Privilege an Anachronism?*, 42 A.B.A.J. 633 (1956); Friendly, *The Fifth Amendment Tomorrow: The Case For Constitutional Change*, 37 U. CIN. L. REV. 671 (1968); McCormick, *Some Problems and Developments in the Admissibility of Confessions*, 24 TEX. L. REV. 239, 277 (1946) stating that:

> [T]he courts as they become more conversant with the history of the privilege will see that it is a survival that has outlived the context that gave it meaning, and that its application today is not to be extended under the influence of a vague sentimentality but is to be kept within the limits of realism and common sense.

[52] "Ours is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the Continent . . . ." Watts v. Indiana, 338 U.S. 49, 54 (1949).

[53] *See generally* Schmerber v. California, 384 U.S. 757 (1966).

[54] 399 U.S. 78 (1970).

[55] FLA. R. CRIM. P. 1.200, readopted by the Florida Supreme Court as present FLA. R. CRIM. P. 3.200. This rule is set out in its entirety in Williams v. Florida, 399 U.S. 78, at Appendix A (1970).

[56] Williams v. Florida, 399 U.S. 78 (1970).

[57] *Id.* at 82 (emphasis added).

In a later case, the Court reemphasized the need for "a balance of forces between the accused and his accuser"[58] and held that a notice of alibi statute which did not require the prosecutor to disclose rebuttal witnesses was unconstitutional. The due process clause of the fourteenth amendment, held the Court, "forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants."[59] In the same opinion, the Supreme Court lauded the development of broad discovery, stating that "[t]he growth of such discovery devices is a salutary development which, by increasing the evidence available to both parties, enhances the fairness of the adversary system."[60]

The majority in *Williams*, in permitting prosecutorial discovery of the defense dismissed the claims of fifth amendment problems on two grounds: 1) The defendant was not being "compelled" within the meaning of the fifth amendment since "nothing requires the defendant to rely on alibi or prevents him from abandoning the defense; the matters are left to his unfettered choice," and 2) the Florida rule only forced the defendant to "accelerate the timing of his disclosure," since he planned from the beginning to divulge the defense at trial.[61] In support of its first argument, the *Williams* majority did not reach the question of whether the information sought by the state before trial was "testimonial" and "incriminating."[62] If such information is "testimonial" and "incriminating," that is if the defendant is aiding in his own prosecution, then the disclosure requirement forces the defendant to choose between abandonment of his constitutional right of silence and waiver of the

[58] Wardius v. Oregon, 412 U.S. 470, 474 (1973), *cf.* Nakell, *The Effect of Due Process in Criminal Defense Discovery*, 62 KY. L.J. 58 (1973).

[59] Wardius v. Oregon, 412 U.S. 470, 472 (1973).

[60] *Id.* at 474. Justices Black and Douglas, however, found this approach towards mutual discovery to be a "radical and dangerous departure from the historical and constitutionally guaranteed right of a defendant in a criminal case to remain completely silent, requiring the state to prove its case without any assistance of any kind from the defendant himself." Williams v. Florida, 399 U.S. 78, 108-09 (1970) (Black & Douglas, JJ., dissenting).

[61] Williams v. Florida, 399 U.S. 78, 84-85 (1970).

[62] "However 'testimonial' and 'incriminating' the alibi defense proves to be, it cannot be considered 'compelled' within the meaning of the Fifth and Fourteenth Amendments." Williams v. Florida, 399 U.S. 78, 84 (1970). *But see* 399 U.S. 78, 86, at n. 17.

defense of alibi. Such a choice is not "unfettered." Waiver of the defense becomes the penalty for remaining silent, and the Court has stated that compulsion exists "when the assertion of the privilege is costly."[63] The Supreme Court has repeatedly held that there can be no penalty imposed on one who exercises a constitutional right.[64]

The issue, then, should not be whether disclosure of the information is being compelled, but whether it is "testimonial" and "incriminating" within the meaning of the fifth amendment. It has been argued that the production of witness lists as required by the Florida rule is testimonial because it entails "a communication from the defendant to the prosecutor the veracity of which would depend on the perception and cognitive processes of the defendant, and on which the prosecutor would rely."[65] In addition, the disclosure of alibi witnesses may

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[63] Griffin v. California, 380 U.S. 609, 614 (1965).

[64] Lefkowitz v. Turley, 414 U.S. 70 (1973)(testimony cannot be compelled on threat of loss of contract without giving immunity); United States v. Freed, 401 U.S. 601 (1971) (no information of past or present violation of law can be used against firearm registrant); United States v. Covington, 395 U.S. 57 (1969); Leary v. United States, 395 U.S. 6 (1969)(marijuana transfer tax); Gross v. United States, 390 U.S. 62 (1968); Gardner v. Brodrick, 392 U.S. 273 (1968); Marchetti v. United States, 390 U.S. 39 (1968) (wagering tax); Haynes v. United States, 390 U.S. 85 (1968) (registration of sawed-off shotgun); Garrity v. New Jersey, 385 U.S. 493 (1967) (police officer); Spevack v. Klein, 385 U.S. 511 (1967) (attorney); Malloy v. Hogan, 378 U.S. 1 (1964); Slochower v. Board of Higher Education, 350 U.S. 551 (1956) (school teacher cannot be dismissed for invoking the fifth); *accord* California v. Byers, 402 U.S. 424 (1971) (no bar to prosecution for hit and run); Bryson v. United States, 396 U.S. 64 (1969) (falsifying information to the government—challenge to validity of the requirement no defense); United States v. Knox, 396 U.S. 77 (1969) (fifth no defense to prosecution for false return; duress may be).

Another recent Supreme Court case also ruled that an accused could not be penalized for his silence. In Doyle v. Ohio, 426 U.S. 610 (1976), the defendants took the stand and gave an exculpatory story which they had not earlier given to the police or prosecutor. The prosecutor attempted to impeach the defendants by cross-examining them as to why they had not given the exculpatory explanation to the arresting officer. The Court held: "[T]he use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment." *Id.* at 2245. *Cf.* Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960). *See also* Wilkes, *The New Federalism in Criminal Procedure Revisited*, 64 KY. L.J. 729 (1976).

[65] Note, *Prosecutorial Discovery Under Proposed Rule 16*, 85 HARV. L. REV. 994, 1003 (1972) [hereinafter cited as Note, *Prosecutorial Discovery*]. *See also* Note, *Criminal Procedure: Pretrial Prosecutorial Discovery and the Privilege Against Self-Incrimination*, 5 UCLA-ALAS. L. REV. 80, 97-98 (1975) [hereinafter cited as Note, *Criminal Procedure*].

be incriminating if such a practice might result in furnishing "a link in the chain of evidence needed to prosecute."[66] While the defendant may anticipate that his witnesses will exculpate him, they may in fact provide leads to additional incriminating information on the charge being prosecuted[67] or on another charge stemming from the same circumstances.

As persuasive as these arguments may seem, however, they do not meet the Court's latter argument that the privilege does not apply when disclosure is required only of material intended for introduction by the defendant at trial, since the disclosure requirement is merely getting at material which will be disclosed during trial anyway. In support of this basis for its holding, the majority declared that "[n]othing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the state's case before announcing the nature of his defense . . . ."[68] Requiring disclosure in advance merely regulates the presentation of the defendant's case and thereby simply allows courts' discretion in arranging the proper order of evidence. In so reasoning the Court pointed to a similar holding in *Jones v. Superior Court*.[69]

In *Jones*, the California Supreme Court had ordered the defendant to disclose before trial medical reports and the names of physicians and surgeons he intended to use to support his defense of impotence against a rape charge. In a later case, this same court limited pretrial disclosure to "factual information" which "the defendant intends to introduce at trial" pertaining to "a particular defense or defenses" and then only after the trial judge determined that "under the facts and circumstances in the case before him" the "disclosure *cannot possibly tend to incriminate [the] defendant*."[70]

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[66] Hoffman v. United States, 341 U.S. 479, 486 (1951).

[67] *See* Williams v. Florida, 399 U.S. 78, 110 (1970) (Black, J., dissenting); Scott v. State, 519 P.2d 774, 785 (Alas. 1974); Note, *Prosecutorial Discovery, supra* note 65, at 1004-1005; Note, *Criminal Procedure, supra* note 65, at 98-101.

[68] Williams v. Florida, 399 U.S. 78, 86 (1970). *See also* Jones v. Superior Court, 372 P.2d 919 (1962); Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228, 247 (1964).

[69] 372 P.2d 919, 22 Cal. Rptr. 879 (1962). *See also* Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228, 247 (1964).

[70] Prudhomme v. Superior Court, 466 P.2d 673, 678, 85 Cal. Rptr. 129, 134 (1970) (emphasis added). *See also* Kane, *Criminal Discovery—The Circuitous Road to a Two-Way Street*, 7 U. SAN. FRAN. L. REV. 203 (1973).

The "acceleration" argument ignores the reason that prosecutorial evidence must precede the defense in our system of criminal justice. The order of the introduction of evidence is inextricably tied to the presumption of innocence. Under this theory, the accused in a criminal case has no duty whatsoever to present even a scintilla of evidence until the prosecution has presented a prima facie case against him.[71]

The importance of the order of evidence presentation was recognized in a case subsequent to *Williams*. In *Brooks v. Tennessee*,[72] the Court held that a statute requiring a criminal defendant to testify before any other defense witness if he was to testify at all violated the fifth and fourteenth amendments. The Court per Justice Brennan[73] explained:

> Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right. By requiring the accused and his lawyer to make that choice without an opportunity to evaluate the actual worth of their evidence, the statute restricts the defense—particularly counsel—in the planning of its case . . . . The accused is thereby deprived of the "guiding hand of counsel" in the timing of this critical element of his defense.[74]

The requirement of *Williams* that the defendant abandon his right to remain silent before he has had a chance to evaluate the prosecution's case or face preclusion of his defense is little different from the choice required of the defendant by the statute in *Brooks*, an inconsistency pointed out by Chief Justice Burger.[75]

Moreover, the two critical elements of the accusatorial criminal justice system, the presumption of innocence and the right to remain silent create protections necessary to ensure responsible conduct by police and prosecutors. Many fear that compelling disclosure before the prosecution has established a

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[71] United States v. Wright, 489 F.2d 1181, 1194-95 (D.C. Cir. 1973).

[72] 406 U.S. 605 (1972).

[73] It is a curious note, however, that Justice Brennan who writes so forcefully and convincingly for the right of the defendant to control for timing of the presentation of his evidence in Brooks v. Tennessee, 406 U.S. 605 (1972), is silent but votes with the majority in Williams v. Florida, 399 U.S. 78 (1970). *See generally* Rezneck, *Justice Brennan and Discovery in Criminal Cases*, 4 RUT.-CAM. L.J. 85 (1972).

[74] 406 U.S. at 612-13.

[75] Brooks v. Tennessee, 406 U.S. 605, 615 (Burger, C.J., dissenting).

prima facie case may result in exploratory prosecutions.[76] As Professor Wigmore explains: "The real objection is that any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of other sources."[77]

Nevertheless, the United States Supreme Court has insisted that "discovery must be a two-way street."[78] Although *Williams v. Florida*[79] has settled challenges to pretrial discovery by the prosecution based on the federal constitution, it has not precluded all constitutional challenges. In *Scott v. State*,[80] the Alaska court reversed a lower court order requiring the defendant to disclose the names and addresses of prospective defense witnesses as well as their statements in support of the accused's alibi defense. The court held that this violated the Alaska Constitution's protection against self-incrimination.[81] Essentially, the Alaska court "evaded" the *Williams* decision by use of the "adequate state ground doctrine"[82] and by basing its decision on a state-insured right which was coextensive with a federal right,[83] the privilege against self-incrimination.[84] In

[76] Nakell, *Criminal Discovery for the Defense and the Prosecution—The Developing Constitutional Considerations*, 50 N.C.L. REV. 437, 508 (1972); Note, *Prosecutorial Discovery, supra* note 65, at 999-1000; Note, *Criminal Procedure, supra* note 65, at 100. Screening devices, such as the preliminary hearing and the grand jury, are not considered by one commentator as very effective in shielding the accused from weak cases. CRIME, LAW AND SOCIETY 184-189 (Goldstein & Goldstein eds. 1971).

[77] 8 J. WIGMORE, EVIDENCE § 2251, at 309 (3d ed. 1940) (emphasis deleted).

[78] Wardius v. Oregon, 412 U.S. 470, 475 (1973).

[79] 399 U.S. 78 (1970).

[80] 519 P.2d 774 (Alas. 1974).

[81] ALAS. CONST. art. I, § 9. *See also* KY. CONST. § 11.

[82] This is the doctrine whereby the United States Supreme Court refuses to disturb a state court judgment resting on an adequate state claim which may be based on a state statute, rule or state constitutional provision. *See* Wilkes, *More on the New Federalism in Criminal Procedure*, 63 KY. L.J. 873 (1975)[hereinafter cited as Wilkes, *New Federalism*] *See also* Wilkes, *supra* note 64.

[83] Wilkes, *New Federalism, supra* note 82, at 882-884. *See generally* Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974); Note, *State Constitutional Guarantees as Adequate State Ground: Supreme Court Review and Problems of Federalism*, 13 AM. CRIM. L. REV. 737 (1976).

[84] "We need not stand by idly and passively, waiting for constitutional direction from the highest court of the land. Instead, we should be moving concurrently to develop and expound the principles embedded in our constitutional law." We are not bound to follow blindly a federal constitutional

Scott the court held that the lower court order requiring pretrial disclosure by the defendant violated the privilege against self-incrimination because the information was testimonial, since it required "a communication of cognizable information from one source to another";[85] incriminating, since disclosure of witnesses could have led to evidence of illegal acts of the accused;[86] and compelled, since disclosure had been mandated by court order.[87] It should be noted, however, that the Alaska court nonetheless required the defendant to give simple notice of his intention to use an alibi defense. This was upheld as constitutional on the theory that such notice "is in the nature of any pretrial plea, much like a plea of 'not guilty' " and is not a disclosure of "the substance of [the] defense theory or any incriminating weaknesses or inconsistencies therein."[88]

The California Supreme Court, although not directly confronting the issue of notice of alibi requirements, has also reserved its right to interpret its own state's constitutional protection of the right against self-incrimination:

> While *Williams* may have laid to rest the contention that notice-of-alibi procedures are inconsistent with the federally guaranteed privilege against self-incrimination, this privilege is also secured to the people of California by our state Constitution, whose construction is left to this court, informed but untrammelled by the United States Supreme Court's reading of parallel provisions.[89]

Assuming *arguendo* that prosecutorial discovery should be rejected, the issue that remains, at least for state courts, is "must increased defense discovery be abandoned because of the unacceptability of prosecutorial discovery?"[90] Those who

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construction of a fundamental principle if we are convinced that the result is based on unsound reason or logic. Scott v. State, 519 P.2d 774, 783 (Alas. 1974) (*quoting* Baker v. City of Fairbanks, 471 P.2d 386 (Alas. 1970).

[85] *Id.* at 785. For an in-depth discussion of the *Scott* opinion see Note, *Criminal Procedure, supra* note 65, at 84-85.

[86] Scott v. State, 519 P.2d 774, 785-86 (Alas. 1970).

[87] *Id.* at 786.

[88] *Id.* at 787.

[89] Reynolds v. Superior Court of Los Angeles, 528 P.2d 45, 49, 117 Cal. Rptr. 437, 441 (1974) (reaffirming its limitations on pretrial disclosure to the prosecution set out in Prudhomme v. Superior Court, 466 P.2d 673, 85 Cal. Rptr. 129 (1970)).

[90] Note, *Prosecutorial Discovery, supra* note 65, at 1011-12.

respond negatively argue that the pretrial discovery by the defendant merely serves to equalize the imbalance that exists between the state and the accused. Because the state wields "the awesome power of indictment and the virtually limitless resources of government investigators"[91] to gather information before trial, it need not, so the argument goes, rely on discovery methods in order to avoid surprise.[92]

Opponents to prosecutorial discovery also believe the criminal justice system should be less concerned with giving the prosecution an "even chance" to win and more concerned about preventing convictions based on surprise rather than truth. It seems a bit ironic that the broad discovery favored by the Supreme Court in *Williams* and *Wardius* is founded on the belief that the "sporting theory of justice" ought to be rejected, when prosecutorial discovery is justified by the same theory, a belief that a criminal trial must be a balanced contest between equal adversaries.[93] This theory implicitly rejects one of the truly fundamental traditions of the Anglo-American criminal justice system, favoring the defendant to prevent the conviction of an innocent person.[94] This tradition goes to the very heart of the Bill of Rights, for as Justice Douglas states: "The Bill of Rights does not envision an adversary proceeding between two equal parties."[95] The fifth amendment was specifically enacted to protect citizens from what was viewed as the overwhelming power of the government over the individual.[96]

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[91] Wardius v. Oregon, 412 U.S. 470, 480 (1973) (Douglas J., concurring). *See also* L. LEVY, AGAINST THE LAW: THE NIXON COURT AND CRIMINAL JUSTICE 141-48 (1974); Note, *Prosecutorial Discovery, supra* note 65 at 1011-12.

[92] *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 1062 (1961) [hereinafter cited as *Discovery*]; Note, *Prosecutorial Discovery*, *supra* note 65, at 1013, n. 68.

[93] At least in the last century no serious student of our system of criminal justice would have suggested that the state and the defendant are equal adversaries. They are equal only in the fictional sense that there are two sides to a criminal case . . . . [W]e still expect the prosecution to act differently than as a mere adversary and we still require the prosecutor to act as the society's agent and not merely as one party in an adversarial system. People v. Williams, 271 N.E.2d 73, 76 (Ill. 1971)(Stouder, J., concurring).

[94] *Discovery, supra* note 92, at 1063.

[95] Wardius v. Oregon, 412 U.S. 470, 480 (1973) (Douglas, J., concurring).

[96] The fifth amendment privilege is the "result of the long struggle between the opposing forces of the spirit of individual liberty on the one hand and the collective power of the state on the other." Brown v. Walker, 161 U.S. 591, 637 (1896). *See also*

The privilege was adopted with a full "realization that while sometimes 'a shelter to the guilty' [it] is often 'a protection to the innocent.' "[97] There are, however, those who reject this concept completely. As Judge Learned Hand wrote: "Our procedure is haunted by the thought of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and watery sentiment that obstructs, delays and defeats the prosecution of crime."[98]

In view of all these arguments and counter-arguments, one commentator observed that: "Few problems of litigation today so intimately intermix practical, earthy considerations of feasibility and 'common sense' with jurisprudential conundrums, as does that of discovery in criminal cases."[99]

B. *The Right to Present a Defense v. The Preclusion Sanction*

The second major constitutional debate raised by pretrial criminal discovery concerns sanctions for non-compliance with a pretrial disclosure order. Many states,[100] as well as the federal rules,[101] provide that failure by the defendant to give notice of a defense or to disclose names of witnesses to be called upon at trial may preclude the defendant from raising that defense or calling those witnesses. Such a sanction, it has been argued, violates the accused's sixth amendment[102] rights to compulsory process and to present a defense.[103]

Justification for the preclusion sanction is anchored in two theories. The first is that failure to disclose evidence before

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Fortas, *The Fifth Amendment: Nemo Tenetur Prodere Seipsum*, 25 CLEV. BAR J. 91 (1954).

[97] Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1965) *citing* Quinn v. United States, 349 U.S. 155, 162 (1955).

[98] United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).

[99] Louisell, *Criminal Discovery: Dilemma Real or Apparent*, 49 CALIF. L. REV. 56 (1961).

[100] *See* Zagel & Carr, *supra* note 30, at Appendix A, Part II.

[101] FED. R. CRIM. P. 12.1(d), 12.2(d), 16 (d).

[102] "In all criminal prosecution, the accused shall enjoy the right to . . . have compulsory process for obtaining witnesses in his favor . . . ." U.S. CONST., amend. VI.

[103] Westin, *Compulsory Process, supra* note 10; Note, *The Preclusion Sanction—A Violation of the Constitutional Right to Present a Defense*, 81 YALE L.J. 1342 (1972) [hereinafter cited as Note, *The Preclusion Sanction*]; Comment, *Constitutional Infirmities of the Revised Illinois Rules of Criminal Discovery*, 7 J. MARSHALL J. PRAC. & PROC. 364 (1974).

trial renders the evidence "presumably unworthy of belief," therefore "incompetent," and refusal to admit "incompetent" evidence into the record has never been held to violate a defendant's constitutional rights.[104] As one state court has explained, the preclusion sanction does "not limit in any way the right of the defendant to testify truthfully in his own behalf. The condition of prior notice of alibi testimony, like the test as to materiality and relevancy, does not violate the right of a defendant to testify in his own behalf."[105] Pretrial disclosure, in other words, insures the reliability of the evidence while refusal to disclose before trial implies deception, and the defendant has no right to deceive, but only a right to testify to the truth.

The United States Supreme Court has not yet addressed the issue of the constitutionality of preclusion of the defense's evidence as a sanction for non-compliance with a pretrial disclosure order.[106] Nonetheless, the Court in *Washington v. Texas* stated that:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.[107]

Commentators have argued that this language logically extends the right of compulsory process to include the right to present tangible evidence as well.[108] In *Washington*[109] the defendant challenged a Texas statute which prohibited one coparti-

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[104] Note, *The Preclusion Sanction, supra* note 103, at 1344.

[105] Simos v. Burke, 163 N.W.2d 177, 181 (Wis. 1968).

[106] The United States Supreme Court left open questions of sanction in both *Williams* and *Wardius*:

> . . . this case does not involve the question of the validity of the threatened sanction . . . . Whether and to what extent a State can enforce discovery rules against a defendant who fails to comply, by excluding relevant, probative evidence is a question raising Sixth Amendment issues which we have no occasion to explore. Williams v. Florida, 399 U.S. 78, 83 at n.14 (1970).

See also Wardius v. Oregon, 412 U.S. 470, 471 at n. 1 (1973). *But see* United States v. Nobles, 422 U.S. 225 (1975) (allowing preclusion of an investigator's testimony when the defense refused to disclose his entire report to the prosecution at trial).

[107] Washington v. Texas, 388 U.S. 14, 19 (1967) (dictum).

[108] Note, *Preclusion Sanction, supra* note 103; Comment, *Expansion of Discovery, supra* note 5.

[109] Washington v. Texas, 388 U.S. 14 (1967).

cipant from testifying on behalf of the other. The record showed that the statute excluded relevant and material testimony,[110] and the Court struck it down as an "arbitrary rule that prevent[s] whole categories of defense witnesses from testifying on the basis of *a priori* categories that presume them unworthy of belief."[111] The Court explained that the rule was arbitrary because it did not "rationally" set apart "a group of persons who are particularly likely to commit perjury,"[112] and that its effect, instead, was an unconstitutional exclusion of witnesses who might testify truthfully.

Similarly, it has been argued that preclusion sanctions for refusal to comply with pretrial discovery orders may arbitrarily exclude relevant, material, and reliable evidence. The defendant may refrain from disclosing names of witnesses for motives other than deception, "fear [of] intimidation or manipulation of his witnesses by the government, either through threats of prosecution or by offers of immunity or attractive bargains," for example, or a "wish to protect either the privacy of his witnesses or his relationship with them from the intensive government investigation which would probably follow disclosure."[113]

In view of *Washington*, a mandatory, complete ban on presentation of defense witnesses would arguably violate the sixth amendment and fundamental due process. While this is true, statutes or rules which are only permissive, stating that the court "may" rather than "shall" preclude witnesses, do not constitute an absolute ban of their testimony unlike the a priori categorization in the Texas statute.[114] In essence, the Texas statute had established an irrebuttable presumption resulting in the exclusion of relevant, material, and potentially reliable evidence. Permissive exclusion, on the other hand, allows the defendant to rebut any presumption of untrustworthiness implied by failure to disclose.[115] Before excluding testimony the court should consider why the witnesses were not listed, how

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[110] *Id.* at 23.

[111] *Id.* at 22.

[112] *Id.*

[113] Note, *Preclusion Sanction, supra* note 103, at 1350.

[114] State v. Jones, 498 P.2d 65 (Kan. 1972); Simos v. Burke, 163 N.W.2d 177 (Wis. 1968).

[115] Comment, *Expansion of Discovery, supra* note 5, at 30.

their testimony would contribute to the merits of the case, and whether any adverse effect to either the prosecution or the defense would result from the ruling.[116]

The preclusion sanction is also justified as the only way to insure compliance with the mandates of pretrial discovery. "It is generally assumed that the [preclusion] sanction is essential if the notice-of-alibi rule is to have any practical significance."[117] This "punitive justification," however, would protect the preclusion sanction from constitutional attack only if a compelling state interest warranted the infringement on the fundamental right to present a defense.[118] Presumably the state interest in forcing compliance with disclosure orders is the elimination of surprise at trial. When there is no demonstration that the prosecution was in fact surprised by the proposed evidence, then evidently there is no compelling state interest requiring protection. Moreover, even if the interest is sufficiently compelling to warrant protection, it must also be determined that there are no less drastic means to realize that end.[119] Suggested alternatives which are less restrictive of the defendant's sixth amendment right to present a defense include continuance of the trial,[120] comment by the prosecution on defendant's failure to comply, criminal sanctions,[121] and contempt against counsel.[122] Assuming that one of these alternatives would be just as effective as preclusion in preserving the compelling state interest, preclusion of the defense's heretofore nondisclosed evidence may be unconstitutional.

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[116] State v. Miner, 258 A.2d 815, 825 (Vt. 1969).

[117] Notes of Advisory Committee on Rules, FED. R. CRIM. P. 12.1, at 18 U.S.C.A. 241 (1975). *See also* Epstein, *Advance Notice of Alibi*, 55 J. CRIM. L.C.&P.S. 29, 35 (1964).

[118] Nakell, *Criminal Discovery for the Defense and the Prosecution—The Developing Constitutional Considerations*, 50 N.C.L. REV. 437, 452 (1972); Note, *Preclusion Sanction, supra* note 103, at 1353-56.

[119] Shelton v. Tucker, 364 U.S. 479, 488 (1960); School District v. Rodriquez, 411 U.S. 1, 51 (1972). *See also* Note, *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification, and Some Criteria*, 27 VAND. L. REV. 971 (1974); Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969).

[120] Connery v. State, 499 P.2d 462 (Okla. Ct. Crim. App. 1972); Okla. Stat. tit. 22, § 585 (1971); Note, *Preclusion Sanction, supra* note 103, at 1357.

[121] Note, *Preclusion Sanction, supra* note 103, at 1358-59.

[122] *Id.*; Norton, *Discovery in the Criminal Process*, 61 J. CRIM. L.C.&P.S. 11, 31-35 (1970); Rezneck, *The New Federal Rules of Criminal Procedure*, 54 GEO. L.J. 1276, 1294 (1966).

Nonetheless, the question remains whether the sixth amendment right to present a defense prohibits preclusion sanction which excludes relevant and material evidence in any event. The United States Supreme Court touched on this issue in *United States v. Nobles*.[123] In this case the lower court precluded the testimony of a defense investigator about a report relating to statements made by key prosecution witnesses because defense counsel indicated that he would refuse to make the investigator's report available to the prosecution at the end of the investigator's testimony. The Supreme Court upheld this action explaining that preclusion of the investigator's testimony on the report did not deprive the defendant of his sixth amendment rights since the trial court had not completely barred the investigator's testimony. The Court justified the exclusion stating: "The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth."[124] Despite this broad language it remains to be seen whether the Court will extend *Nobles* to permit wholesale exclusion of defense evidence because of failure to provide the prosecution with pretrial discovery.

II. THE ABA STANDARDS AND PRESENT LAW

A. *Discovery by the Prosecution: The ABA Standards and Present Law*

While original ABA standards did not require that defenses or witnesses be disclosed to the prosecution,[125] the ABA House of Delegates upon adoption of the standards added the following provision:

> Subject to constitutional limitations, the trial court may require that the prosecuting attorney be informed of the nature of any defenses which defense counsel intends to use at trial

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[123] 422 U.S. 225 (1975).

[124] *Id.* at 241. This testimony would have been used for impeachment of prosecution witnesses, not for presentation of an affirmative defense.

[125] ABA STANDARDS, *supra* note 4, at *Commentary* 43-46 (Tentative Draft, May 1969).

> and the names and addresses of persons whom defense counsel intends to call as witnesses in support thereof.[126]

The commentary accompanying this section recognizes that this provision is "narrowly skirting certain constitutional limitations which are not fully delineated," and explains that the condition "subject to constitutional limitations" was inserted as a precaution.[127] This standard has been proposed as a pattern rule of court[128] and has been adopted in substantially the same form as a court rule in Illinois.[129]

Rules in 23 states, in addition to Federal Rule of Civil Procedure 12.1, require notice of alibi;[130] Kentucky does not. Federal Rule 12.1 is quite similar to the Florida notice of alibi requirement upheld in *Williams v. Florida*;[131] the notice and

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[126] ABA STANDARDS, *supra* note 4, at Supp., *Proposed Revisions* at 3-6 (adopted August 1970).

[127] *Id.* at 4. This commentary was written after Williams v. Florida, 399 U.S. 78 (1970).

[128] P. WILSON, PATTERN RULES OF COURT AND CODE PROVISIONS § 7-2.3, at 126 (1976) (prepared for Committee on Implementation of Standards for the Administration of Justice of the Section of Criminal Justice of the American Bar Association) [hereinafter cited as PATTERN RULES].

[129] ILL. S. CT. RULE 413 (d) (Special Pamphlet, Oct. 4, 1971). The Illinois Supreme Court has already adopted all of the other essential provisions of the ABA Standards as well. ILL. S. CT. RULES 411-15. For a discussion of the Illinois rules from a prosecutorial viewpoint see Zagel & Carr, *State Criminal Discovery and the New Illinois Rule*, 1971 U. ILL. L.F. 557; from a judge's viewpoint see Strayhorn, *Full Criminal Discovery in Illinois: A Judge's Experience*, 56 JUDICATURE 279 (1973); and for a critical view by defense counsel see Doherty, *Total Pretrial Disclosure to the State: A Requiem to the Accusatorial System*, 60 ILL. BAR J. 534 (1972); Comment, *Constitutional Infirmities of the Revised Illinois Rules of Criminal Discovery*, 7 J. MARSHALL J. PRAC. & PROC. 364 (1974).

[130] *See* ARIZ. R. CRIM. P. 192G; COLO. R. CRIM. P. 12.1; FLA. R. CRIM. P. 1.200; ILL. REV. STAT. ch. 38, §114-14 (1971); IND. ANN. STAT. §9-1639 (1956); IOWA CODE ANN. §777.18 (1950); KAN. STAT. ANN. §22-3218 (Supp. 1970); ME. R. CRIM. P. 16(b); MICH. COMP. LAWS ANN. §768.20,.21 (1968); MINN. STAT. §630.14 (1967); MONT. REV. CODES ANN. §95-1803(d) (1969); NEV. REV. STAT. §174.087 (1969); N.J. CT. R. 3:11-1; N.Y. CODE CRIM. PROC. §250.20 (McKinney 1971); OHIO REV. CODE ANN. §2945.58 (Page 1954); OKLA. STAT. tit. 22, §585 (1961); ORE. REV. STAT. §135.875 (1969); PA. R. CRIM. P. 312; S.D. COMPILED LAWS ANN. §§23-37-5, -6 (1967); UTAH CODE ANN. §77-22-17 (1953); VT. STAT. ANN. tit. 13, §§6561-62 (1958); WASH. REV. CODE ANN. §10,37.033 (Supp. 1970); WIS. STAT. ANN. §971.23(8) (1971).

The scope of the notice and the sanctions for noncompliance vary significantly from state to state. For an outline of the requirements of the above listed rules and statutes see Zagel & Carr, *State Criminal Discovery and the New Illinois Rules*, 1971 U. ILL. L.F. 557 (Appendix A at 637-640).

[131] 399 U.S. 78 (1970).

disclosure of witnesses is mandatory upon written demand by the government.[132] The defense also has a reciprocal right to the names and addresses of witnesses upon whom the government intends to rely either "to establish the defendant's presence at the scene of the alleged offense" or "to rebut testimony of any of the defendant's alibi witnesses."[133] As such the rule appears to be in accord with the due process requirement of reciprocity established by *Wardius v. Oregon*.[134]

Kentucky's practice is consistent with the federal rules in requiring the giving of notice when the defendant intends to use the defense of insanity. Neither the federal rule[135] nor the Kentucky statute[136] require the names and addresses of witnesses to be used to support that defense, but Federal Rule 12.2(b) mandates disclosure of the defense's intention to make use of expert testimony. These notice of insanity requirements, however, do not present the fifth amendment problems present under the notice of alibi statutes. Simple notice of insanity has been distinguished from the requirement of production of alibi evidence and witnesses in that "transfer of notice does not provide any factual information which the prosecution can use against the defendant,"[137] and hence is not incriminating.

Rule 12.2, however, is arguably insufficient in that it requires notice by the defense of intention to use expert testimony but does not provide the defense with an opportunity to discover what evidence the prosecution would rely upon to rebut the insanity defense.[138] In *Wardius v. Oregon*, the U.S. Supreme Court stated that: "[I]n the absence of fair notice that he would have an opportunity to discover the State's re-

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[132] FED. R. CRIM. P. 12.1(a). For a thorough discussion of the new federal rules see Comment, *Expansion of Discovery, supra* note 5.

[133] FED. R. CRIM. P. 12.1 (b).

[134] 412 U.S. 470 (1973)(requiring disclosure by the government of names and addresses of witnesses whom it will use in its "refutation of the very pieces of evidence which [the defendant] disclosed to the State") *Id.* at 476. *See also* Nakell, *The Effect of Due Process on Criminal Defense Discovery*, 62 KY. L.J. 58, 62-66 (1973) (the commentator suggests that by disclosing a small amount of alibi evidence the defense can discover practically the entire case of the prosecution).

[135] FED. R. CRIM. P. 12.2.

[136] KRS § 504.050 (1975).

[137] Comment, *Expansion of Discovery, supra* note 5, at 32. *See also* Radford v. Stewart, 320 F. Supp. 826, 829 (D. Mont. 1970); Commonwealth v. Pritchett, 312 A.2d 434 (Pa. 1973).

[138] FED. R. CRIM. P. 12.2(a).

buttal witnesses, petitioner cannot be compelled to reveal his alibi defense."[139] Thus, under an extension of *Wardius*, Rule 12.2 may violate notions of fundamental fairness.[140] The drafters of the Kentucky statute recognized the need for reciprocity under *Wardius* and so provided that the prosecution must inform the defendant of "the names and addresses of the witnesses the state proposes to offer in denial of the . . . defense, along with any medical reports prepared by those witnesses" on the defendant's mental condition;[141] this is true even though the defendant is required to give only notice of the defense and not names of witnesses.

Both the federal and Kentucky law also provide for a psychiatric examination of the defendant by a court-appointed doctor. The federal rule, however, leaves the ordering of such an examination to the discretion of the court upon a motion by the prosecution.[142] The Kentucky statute requires the court to order the examination once the defendant has given notice of his defense.[143]

These court-ordered psychiatric examinations generally present no fifth amendment problems so long as evidence acquired during the examination is used to aid in determining insanity and not guilt.[144] Moreover, the Kentucky statute better protects the defendant's interest than the federal rules in that it allows the defendant's psychiatrist to witness and participate in the examination by the state psychiatrist.[145]

Regarding other discovery by the prosecution, both the federal and Kentucky rules provide that discovery by the defense may be conditioned upon the defense's disclosure of certain evidence to the prosecution.[146] The original proposed amendment to the federal criminal discovery provisions would

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[139] 412 U.S. 470, 479 (1973).

[140] Comment, *Expansion of Discovery, supra* note 5, at 31.

[141] KRS § 504.050(3)(1975)(Commentary).

[142] FED. R. CRIM. P. 12.2 (c).

[143] KRS § 504.050(2)(1975).

[144] *See* KRS § 504.050 (1975) (Commentary) *citing* United States v. Pate, 409 F.2d 498 (7th Cir. 1969); State v. Ordog, 212 A.2d 370 (N.J. 1965); People v. Abdul Karim Al-Kanani, 260 N.E.2d 496 (N.Y. 1970). *See also* Schmerber v. California, 384 U.S. 757 (1966) and United States v. Dionisio, 410 U.S. 1 (1973).

[145] KRS § 504.050(2) (1975).

[146] FED. R. CRIM. P. 16(b)(1)(A); KY. R. CR. 7.24 (3).

have granted "independent" discovery rights to the prosecution so that the prosecution would have been entitled to discover the defendant's evidence even without prior request for discovery by the defense.[147] This approach was vigorously and apparently effectively criticized[148] and rejected in favor of "conditional" or "reciprocal" discovery. Thus, the prosecution is not entitled to discovery unless the defense first requests information.

Presumably this change was made in the belief that conditional government discovery would minimize the risk that permitting pretrial discovery by the prosecution would infringe upon the defendant's fifth amendment privilege against self-incrimination. Since the defendant is triggering disclosure by requesting evidence from the prosecution, he waives any fifth amendment protections he may have.[149] It has been argued, however, that the defendant's access to the prosecution's evidence is being conditioned upon the waiver of the defendant's fifth amendment privilege, and that this in effect penalizes the defense for exercising a constitutional right.[150] In view of *Williams v. Florida*[151] and because disclosure is limited to evidence intended to be introduced at trial as evidence in chief, it is arguable that no fifth amendment privilege is being penalized under the federal rules.

Kentucky Rule of Criminal Procedure 7.24(3) also allows discovery of certain evidence that the defendant intends to introduce at trial, but only after the defendant has been granted discovery of the Commonwealth's tangible evidence.

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[147] *See* Notes of Advisory Committee on Rules, 1974 Amendment, FED. R. CRIM. P. 16, at 18 U.S.C.A. 370 (1975).

[148] Note, *Prosecutorial Discovery, supra* note 65.

[149] *See* Notes of Advisory Committee on Rules, 1974 Amendment, FED. R. CRIM. P. 16, at 18 U.S.C.A. 370 (1975). *See also* Moore, *Criminal Discovery*, 19 HAST. L.J. 865 (1968); Wilder, *Prosecution Discovery and the Privilege Against Self-Incrimination*, 6 AM. CR. L.Q. 3 (1967).

[150] *See generally* United States v. Fratello, 44 F.R.D. 444 (1968); ABA STANDARDS, DISCOVERY, *supra* note 4, at Commentary 43-46; C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 256 (1969, Supp. 1971); Black, *Statements on Amendments to Rules of Criminal Procedure*, 39 F.R.D. 69, 272 (1966); Douglas, *Statements on Amendments to Rules of Criminal Procedure*, 39 F.R.D. 69, 277 (1966); Smith & McCollom, *Counterdiscovery in Criminal Cases: Fifth Amendment Privileges Abridged*, 54 A.B.A.J. 256 (1968); Note, *Criminal Law; Constitutionality of Conditional Mutual Discovery Under Federal Rule 16*, 19 OKLA. L. REV. 417 (1966).

[151] 399 U.S. 78 (1970).

The constitutionality of this provision under the Kentucky Constitution's privilege against self-incrimination[152] has not been challenged. It should be noted, however, that this rule gives the Commonwealth the right to inspect, copy, or photograph "statements" which the defendant intends to introduce at trial without regard to whether the evidence will be used as evidence in chief or for impeachment. Kentucky Criminal Rule 7.24(2), on the other hand, specifically precludes the defense from inspecting statements made by witnesses to agents or officers of the Commonwealth. Assuming *Wardius v. Oregon*[153] requires "tit-for-tat" reciprocity, this section may be unconstitutional as violative of the requirements of due process and fundamental fairness.[154]

Furthermore, although recently refusing to apply fifth amendment protections to statements of third parties obtained by a defense investigator,[155] the Supreme Court held that such statements are protected by the work product doctrine.[156] Statements made by witnesses to the defense or prosecution are explicitly protected from disclosure by Federal Rule 16(a) and (b)(2).

Another important difference between the federal and Kentucky rules of discovery is that the federal rules *require* disclosure to the prosecution once the defendant has received discovery under Rule 16(a)(1)(C) or (D), while the Kentucky rules merely *permit* the conditioning of disclosure to the de-

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[152] KY. CONST. § 11 (state-protected privilege against self-incrimination).

[153] 412 U.S. 470 (1973).

[154] D. MURRELL, KENTUCKY CRIMINAL PRACTICE 87 (1975) [hereinafter cited as MURRELL].

[155] United States v. Nobles, 422 U.S. 225 (1975). The Court reasoned that the fifth amendment privilege is an "intimate and personal one" and the fact that the defense investigator had elicited the statements on behalf of the defendant did not "convert" them into the defendants' personal communications. Thus, the Court concluded, "[t]he Fifth Amendment privilege against compulsory self-incrimination, being personal to the defendant, does not extend to the testimony or statements of third parties called as witnesses at trial." *Id.* at 234.

[156] The defense counsel wanted to impeach the credibility of key prosecution witnesses through the testimony of the defense investigator based on statements obtained by him from those witnesses. The trial court conditioned the investigator's testimony upon disclosure of the investigator's full report of his conversations with the prosecution witnesses. Defense counsel refused to make the disclosure. The Court stated that while the report was protected by the work product doctrine the privilege was waived by defense counsel's election to present the investigator as a witness. *Id.* at 238-40.

fense with the requirement of reciprocal disclosure to the prosecution.[157] Thus, a Kentucky court is free to exercise its complete discretion in making such a demand.

Finally, in the realm of prosecutorial discovery, the ABA standards also codified recent court decisions which make the "person" of the defendant subject to state investigatory procedures.[158] Pursuant to those decisions the accused must appear in line-ups;[159] provide voice exemplars,[160] fingerprints and handwriting samples;[161] and allow reasonable physical or medical examinations.[162] These investigatory procedures have generally been allowed in federal as well as Kentucky courts.

B. *Discovery by the Defense*

The ABA Standards for Criminal Discovery also propose liberal provisions for pretrial discovery by the defense. In defining the scope of discovery, section 1.2 states that "discovery . . . should be as full and free as possible . . . ."[163] The standards place responsibility for expeditious discovery on counsel as well as the court.[164]

The standards require that the prosecutor not only disclose exculpatory material but also that he do so before trial.[165] In addition, the prosecutor must disclose any statements of the accused, his codefendant, or prospective witnesses, including testimony before the grand jury; the names and addresses of witnesses whom he intends to call at trial; the reports, statements and findings of any experts; tangible evidence to be used at trial; and witnesses' criminal records.[166] Under the standards, the defendant must also be notified when the prosecutor has relevant material or information provided by an informant

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[157] KY. R. CR. 7.24(3). Note use of the word "may."

[158] ABA STANDARDS, DISCOVERY, *supra* note 4, at § 3.1.

[159] *Cf.* United States v. Wade, 388 U.S. 218 (1967).

[160] United States v. Dionisio, 410 U.S. 1 (1973); *cf.* KRS § 422.120.

[161] Gilbert v. California, 388 U.S. 263 (1967).

[162] Schmerber v. California, 384 U.S. 757 (1966).

[163] ABA STANDARDS, DISCOVERY, *supra* note 4.

[164] *Id.* § 1.4.

[165] ABA STANDARDS, DISCOVERY, *supra* note 4, at § 2.1(c). *See also* the discussion of Brady v. Maryland, 373 U.S. 83 (1963), *infra* notes 252 to 257 and accompanying text.

[166] *Id.* § 2.1(a).

or relevant grand jury testimony which has not been transcribed, and he is entitled to notification that there has been electronic surveillance of conversations to which he was a party or which occurred on the defendant's premises.[167]

The defendant, however, will receive information concerning specified searches and seizures only upon request. A request is also necessary to obtain copies of the accused's own statements and the relationship, if any, of specified persons to the prosecuting authority.[168] In addition, the court at its discretion may order the disclosure of other information upon a showing of materiality.[169]

In this way, the standards remedy some of the inequities in the present criminal discovery system by granting the accused access to evidence obtained through grand juries, superior scientific facilities, more efficient investigative procedures and accessibility to greater manpower. Moreover, the standards bar either party from hindering the investigative work of the other.[170] This should aid defendants, who often encounter potential witnesses already warned by the police not to talk.[171]

Disclosures under these standards, however, are subject to certain limitations. If the trial court finds that there is any substantial risk to any person of physical harm, economic reprisals, bribery or even "unnecessary annoyance or embarassment," and that such risk outweighs any benefits to the defense, the court may deny disclosure.[172] Furthermore, section 4.4, applicable to both the defense and prosecution, provides for protective orders permitting specified disclosures to be restricted or deferred. The material, however, must be disclosed in time to permit counsel to make use of it. These protections should allay fears of witness intimidation and harassment.

Areas of information which are not subject to disclosure by

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[167] *Id.* § 2.1(b).

[168] *Id.* § 2.3.

[169] *Id.* § 2.5(a). *See* Gregory v. United States, 369 F.2d 185 (D.C. Cir. 1966) (court prohibited counsel for either side from advising witnesses not to discuss the case with the other parties).

[170] ABA STANDARDS, DISCOVERY, *supra* note 4, at § 4.1.

[171] Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1182-83 (1960).

[172] ABA STANDARDS, DISCOVERY, *supra* note 4, at § 2.5(6).

the prosecution are work product, informants' identity where failure to disclose will not infringe upon the accused's constitutional rights, and information involving a "substantial risk of grave prejudice to national security."[173] Protection of work product, of course, is not a new concept, and civil cases dealing with this issue offer some guidance.[174] Moreover, the work product doctrine has recently been extended to criminal cases by the U.S. Supreme Court.[175] Section 2.6(2) limits the "work product" to reports or memoranda which reflect the "opinions, theories or conclusions of the prosecuting attorney or members of his legal staff." This does not include theories or conclusions of lab technicians or other experts discoverable under section 2.1(a)(iv).[176]

The prohibition against disclosure of informant's identity is in line with Supreme Court decisions holding that such disclosure is necessary only when the informant's testimony will be given at trial.[177] While there are few cases involving prohibition of disclosures endangering national security, the ABA committee felt provision should be made for the rare case.[178]

Under present Kentucky law, pretrial defense discovery in criminal cases is not so broad as the ABA standards.[179] Neither the Kentucky nor the federal rules provide for pretrial disclosure of names, addresses, or statements of witnesses whom the prosecution intends to call at trial. In fact, Kentucky Criminal Rule 7.24(2) specifically prohibits the defendant from pretrial discovery[180] of witnesses' statements to the Commonwealth or

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[173] *Id.* § 2.6.

[174] *Cf.* Hickman v. Taylor, 329 U.S. 495 (1947).

[175] United States v. Nobles, 422 U.S. 225 (1975).

[176] ABA STANDARDS, DISCOVERY, *supra* note 4, at 91.

[177] McCray v. Illinois, 386 U.S. 300 (1967); Roviaro v. United States, 353 U.S. 53 (1957).

[178] ABA STANDARDS, DISCOVERY, *supra* note 4, at 93.

[179] For a skeletal comparison of Kentucky discovery law and the ABA Standards see *Comparative Analysis of American Bar Association Standards for Criminal Justice with Kentucky Law, Rules and Legal Practice* sponsored by the Kentucky Judicial Conference (March 1974).

[180] This note focuses on pretrial criminal discovery, that is, discovery from arraignment to the impaneling of the jury, and does not deal with discovery during trial. It should be noted, however, that Kentucky, as do most states, provides that after a prosecution witness has testified on direct examination, the defendant may move to examine any documented or recorded statement of the witness which the Commonwealth possesses. KY. R. CR. 7.26. *See also* Roach v. Commonwealth, 507 S.W.2d 154

its investigators.[181] Nonetheless, all exculpatory settlements are still subject to disclosure.[182] Kentucky Criminal Rule 6.08 does require that the Commonwealth endorse the names of all grand jury witnesses on the indictment. A federal statute provides for a similar endorsement but only in capital cases.[183] Such endorsement, however, is of little help as a discovery tool in Kentucky since the Commonwealth is not required to reveal the source of the information on which the grand jury witness based his testimony.[184] Because hearsay is admissible in grand jury proceedings,[185] the Commonwealth can call before the grand jury a police officer to reiterate statements made to him by other witnesses whose identity will remain unknown to the defense. Furthermore, the Commonwealth at trial is not limited to calling only those who testified before the grand jury,[186] nor is it required to produce all the witnesses who appeared before the grand jury.[187]

Kentucky law is in accordance with the ABA standards in providing for a government privilege to withhold an inform-

(Ky. 1974); Lynch v. Commonwealth, 472 S.W.2d 263 (Ky. 1971). However, the Kentucky high court has held that failure to require production of police reports not purporting to contain substantially verbatim statements of the witness was not reversible error. Pankey v. Commonwealth, 485 S.W.2d 513, 520 (Ky. 1972). KY. R. CR. 7.26 has been referred to by the then Kentucky Court of Appeals as "our counterpart of the Jencks Act, 18 U.S.C. § 3500." Lynch v. Commonwealth, 472 S.W.2d 263, 267 (Ky. 1971).

[181] *See also* Robinson v. Commonwealth, 490 S.W.2d 481, 482 (Ky. 1973); Davis v. Commonwealth, 463 S.W.2d 133 (Ky. 1970).

[182] Pankey v. Commonwealth, 485 S.W.2d 513 (Ky. 1972). The defendants moved for disclosure of the names of all witnesses who failed to identify appellants as participants in crimes and any statements of such witnesses with regard to descriptions of participants and other details of crimes as observed by the witnesses. The Court of Appeals held there was no error in nondisclosure since there was no showing that the Commonwealth had such knowledge. The Court added, however: "A different matter would be involved if appellants were able to show that they did not have available the testimony of a witness who would have exonerated them because the prosecution knowingly suppressed the name of the witness." *Id.* at 520.

[183] 18 U.S.C. § 3432 (1970).

[184] Pankey v. Commonwealth, 485 S.W.2d 513 (Ky. 1972) (KY. R. CR. 6.08 requires endorsement of the names of persons upon whose statements the information is based only when prosecution is by information).

[185] KY. R. CR. 5.10. *See also* Costello v. United States, 350 U.S. 359 (1957).

[186] Harris v. Commonwealth, 315 S.W.2d 630 (Ky. 1958); Watts v. Commonwealth, 213 S.W.2d 795 (Ky. 1948); Long v. Commonwealth, 155 S.W.2d 246 (Ky. 1941).

[187] Harris v. Commonwealth, 315 S.W.2d 630, 632 (Ky. 1958).

ant's identity except where the constitutional rights of the accused will be adversely affected.[188] In addressing this issue, the Kentucky Court of Appeals stated in *Burks v. Commonwealth*[189] that: "The significant point is that when an informer participates in or places himself in the position of observing a criminal transaction he ceases to be merely a source of information and becomes a witness." The Court went on to explain that, while it would generally recognize the state's need to maintain the anonymity of its sources of information, the Court knew of "no valid principle under which the identity of a known witness may be concealed from adversary parties in any kind of a judicial proceeding, criminal or civil."[190] In spite of this broad language, the Kentucky Court has not extended disclosure of the name of a material witness in a criminal case beyond the informant situation.[191] Moreover, the Kentucky Court has not required that this disclosure be made before trial. Such a requirement, however, would be in line with the ABA standards[192] and the leading U.S. Supreme Court opinion on disclosure of informants, *Roviaro v. United States*,[193] upon which the Kentucky Court relied in *Burks*.

Upon request by the defendant, disclosure of his statements is mandatory under the federal rules[194] and discretionary with the court under Kentucky rules.[195] In *Riebesehl v. Commonwealth*,[196] the Court of Appeals, now the Supreme Court of Kentucky, held that nonproduction of a defendant's confession before trial did not constitute reversible error. In so

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[188] ABA STANDARDS, DISCOVERY, *supra* note 4, at § 2.6(b); Jenkins v. Holbert, 485 S.W.2d 238 (Ky. 1972); Buchenburger v. Commonwealth, 482 S.W.2d 747 (Ky. 1972); Thompson v. Commonwealth, 472 S.W.2d 884 (Ky. 1971); Berkshire v. Commonwealth, 471 S.W.2d 695 (Ky. 1971).

[189] 471 S.W.2d 298, 300-01 (Ky. 1971).

[190] *Id.* at 300.

[191] *See* Dryden v. Commonwealth, Memorandum Opinion (75-360, June 1976). *But see* MURRELL, *supra* note 154, at 81.

[192] ABA STANDARDS, DISCOVERY, *supra* note 4, at § 2.1(a)(i).

[193] 353 U.S. 53 (1957) in which the Court stated: "[W]e think that the court erred also in denying, *prior to trial*, petitioner's motion for a bill of particulars, insofar as it requested John Doe's [the informant's] identity and address." (emphasis added). *Id.* at 64.

[194] FED. R. CRIM. P. 16(a)(1)(A).

[195] KY. R. CR. 7.24(1)(a). *See also* Robinson v. Commonwealth, 490 S.W.2d 481, 482 (Ky. 1973).

[196] 434 S.W.2d 41, 43 (Ky. 1968).

holding, however, the Court emphasized that the jury in *Riebesehl* was admonished to disregard the defendant's statements as testified to by a police officer at trial. In a more recent case, the Court held that it did not constitute error for the prosecutor to introduce the accused's tape recorded conversations which had not been produced before trial pursuant to a pretrial discovery order under Kentucky Criminal Rule 7.24.[197]

Although Federal Rule 16(a) allows a defendant to discover his own statements in the possession of the government, the Jencks Act[198] prohibits the disclosure of statements by prospective witnesses. In *United States v. Feinberg*[199] the court had to decide whether the portion of a government witness's statement, which contained a statement by the defendant, had to be disclosed under 16(a). The circuit court ruled that the defendant's statements could not be discovered in view of the Jencks Act. In some instances, therefore, the Jencks Act will reduce the discovery permitted under Rule 16.[200]

In addition, neither the federal nor Kentucky rules provide for discovery of a statement by a codefendant. Nor does either set of rules provide for disclosure of prior criminal convictions of prosecution witnesses; the federal rules do require, however, disclosures of a codefendant's prior record.[201] This puts the defendant at a decided disadvantage since he does not have the access of the prosecution to criminal records in other jurisdictions. This is especially crucial in Kentucky since prior convictions can be used to impeach witnesses if such convictions are for crimes indicative of dishonesty.[202] The defense is thus, in some cases, denied an opportunity to cross-examine a prosecution witness effectively.

Kentucky also provides that if grand jury testimony is

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[197] Deskins v. Commonwealth, 512 S.W.2d 520 (Ky. 1974). It should be recognized, however, that the case involved an unusual fact situation. The conversations were between the defendant and a person who had pilfered portions of the Commonwealth's case file for the defendant. Both the defendant and his attorney had opportunity to hear the tapes out of the presence of the jury before they were introduced as evidence.

[198] 18 U.S.C. § 3500 (1970).

[199] 502 F.2d 1180 (7th Cir. 1974). *See also* Comment, *Criminal Discovery*, 51 CHI.-KENT L. REV. 633 (1975).

[200] *See* Comment, *Expansion of Discovery*, *supra* note 5, at 36.

[201] FED. R. CRIM. P. 16(a)(1)(B).

[202] Cotton v. Commonwealth, 454 S.W.2d 698 (Ky. 1970).

transcribed, a copy must be given to the defendant.[203] The decision to transcribe such proceedings, however, is entirely within the discretion of the prosecution.[204] Moreover, the defendant does not have a right to elect to have the grand jury testimony transcribed.[205]

Disclosure of documents, tangible objects, and reports of examinations or tests is also mandatory upon the defense's request under Federal Rule 16(a)(1)(C) and (D) and discretionary under Kentucky Criminal Rule 7.24(1) and (2).[206] The federal rule is broader than the Kentucky rule as Federal Rule 16 allows discovery not only of evidence material to the defense's preparation, but also of any evidence intended for use by the prosecution at trial. Kentucky Criminal Rule 7.24(2), on the other hand, limits discovery of tangible evidence to that which is "material" to the preparation of the defense. Furthermore, the Kentucky high court has given "materiality" a very narrow interpretation in that the evidence sought by the defendant must be exculpatory. In *Pankey v. Commonwealth*,[207] the defendant moved to discover photographs used in a line-up. The defendant argued that the photographs could be used to impeach witnesses who had not been able to identify him in the line-up. The lower court's denial of the defendant's motion was upheld on appeal on the basis that even if the defendant could have shown through use of the photos that there had been a failure to identify, this was "not necessarily evidence of innocence"[208] and presumably not material to the defense. Given

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[203] KY. R. CR. 5.16(2).

[204] Davis v. Commonwealth, 463 S.W.2d 133 (Ky. 1970); Parker v. Commonwealth, 461 S.W.2d 86 (Ky. 1970); Amburgey v. Commonwealth, 415 S.W.2d 103 (Ky. 1967); White v. Commonwealth, 394 S.W.2d 770 (Ky. 1965).

[205] Lawless v. Commonwealth, 539 S.W.2d 101 (Ky. 1976).

[206] For discovery of documents under Kentucky rules see KY. R. CR. 7.08. In addition, KRS § 422.120(2) requires reasonable notice of intention to introduce handwriting samples in cases where the handwriting is actually in dispute. It further allows the other side reasonable opportunity to inspect the samples before trial. *But see* Francis v. Commonwealth, 468 S.W.2d 287, 290 (Ky. 1971) in which the Court explained that the purpose of notice is to afford a defendant the opportunity to question the genuineness of samples. Therefore, the notice requirement is not applicable where samples are admitted to be genuine.

[207] 485 S.W.2d 513 (Ky. 1972). This interpretation of "materiality" appears to be in line with the latest United States Supreme Court opinion defining "materiality." United States v. Agurs, ___ U.S. ___, 95 S.Ct. 2392 (1976).

[208] *Id.* at 520. *See also* MURRELL, *supra* note 154, at 88.

this interpretation, the defendant could be denied documents, reports, or other tangible evidence which, although not exculpatory per se, may lead to exculpatory evidence. *Pankey*, nonetheless, concerned tangible evidence which was not subsequently introduced at trial; if the evidence sought had been subsequently introduced, even though not exculpatory, the Court might have ordered disclosure on the basis of fairness. In any case, the discretionary language of the rule gives the trial judge much leeway in ordering prosecutorial disclosure.

In addition to materiality, Kentucky Criminal Rule 7.24(2) also requires that the material sought by the defense must be in the actual possession of the Commonwealth[209] and that the request be reasonable.[210] The Kentucky Supreme Court will not allow the defendant "free rein to rummage at will through the prosecution's file to discover whether anything therein may be of value,"[211] but neither will the Court allow "a cat and mouse game whereby the Commonwealth is permitted to withhold important information requested by the accused."[212]

Kentucky Criminal Rule 7.24(1) allows the defendant to inspect "the results of mental and physical examinations and of scientific tests or experiments made in connection with the particular case" and "known by the attorney for Commonwealth to be in the possession, custody or control of the Commonwealth . . . ." This rule does not require a showing of materiality, however. Thus, in *James v. Commonwealth*,[213] a case involving illegal narcotic sales, the Court held that the Commonwealth's failure to provide the defense with an opportunity to inspect drug samples and chemists' reports submitted to the police and subsequently introduced at trial was reversible error. The court at its discretion, however, can refuse to order disclosure of scientific reports even though they are in the possession of the Commonwealth if they are not exculpatory per se and are not intended for introduction at trial.[214]

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[209] Stone v. Commonwealth, 418 S.W.2d 646 (Ky. 1967), *cert. denied*, 390 U.S. 1010 (1968).

[210] KY. R. CR. 7.24(1)(b); Pankey v. Commonwealth, 485 S.W.2d 513 (Ky. 1972).

[211] Pankey v. Commonwealth, 485 S.W.2d 513, 521 (Ky. 1972).

[212] James v. Commonwealth, 482 S.W.2d 92, 94 (Ky. 1972).

[213] *Id.*

[214] Kentucky defense counsel should also be cognizant of Barclay v. Common-

In consideration of nondisclosure of work product, Kentucky Criminal Rule 7.24(2) goes beyond the work product protection contemplated by the ABA standards; it prevents pretrial discovery of all reports and memoranda of officers including reports of any statements made to officers by witnesses. Once an officer testifies at trial, however, the defense is entitled to see investigative reports upon which the officer relied.[215]

C. *Sanctions for Noncompliance*

The ABA Advisory Committee declined to provide specific sanctions for violations of proposed discovery rules; instead, it left the question of remedies to the trial court, giving it power to enter whatever order it deems just under the circumstances. The standards present only three specific suggestions for dealing with a party who fails to comply with a discovery rule or order: (1) Order the party to permit discovery of the information not previously disclosed, (2) grant a continuance, or (3) take appropriate action against counsel for willful violation of a discovery rule or order.[216]

A virtually identical wide-open approach is taken in Federal Rule 16(d)(2) and Kentucky Civil Rule 7.24(9) which deal with discovery of documents, statements, and tangible objects. These rules were drafted in the belief that such discretion will free the court "to consider the reasons why disclosure was not made, the extent of the prejudice, if any, to the opposing party, the feasibility of rectifying that prejudice by a continuance, and any other relevant circumstances."[217]

These rules, however, differ from ABA standard 4.7 in one major respect. Both rules specifically allow a party to be pro-

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wealth, 499 S.W.2d 283 (Ky. 1973), in which the Commonwealth had failed to produce tests as ordered by the trial court pursuant to KY. R. CR. 7.24. Defense counsel when the case was called for trial, however, answered, "Ready." The Court of Appeals held that defense could not appeal on the basis of the prosecutor's failure to disclose since "[i]f there was non-compliance with the order to furnish information the response that Barclay was ready for trial was a waiver." *Id.* at 285.

[215] LeGrande v. Commonwealth, 494 S.W.2d 726 (Ky. 1973); Maynard v. Commonwealth, 497 S.W.2d 567 (Ky. 1973).

[216] ABA STANDARDS, DISCOVERY, *supra* note 4, at § 4.7. *See* KRS § 432 (contempt).

[217] Notes of Advisory Committee on Rules, FED. R. CRIM. P. 16, at 18 U.S.C.A. 364 (1975).

hibited from introducing tangible evidence which has not been previously disclosed. This provision, however, was intentionally omitted by the ABA committee[218] because of the constitutional difficulties in using such a sanction against the accused already discussed. Moreover, the committee wanted to insure that sanctions for procedural noncompliance would affect the evidence at trial and merits of the case as little as possible, "since these standards are designed to implement, not to impede, fair and speedy determination of cases."[219]

As was noted earlier, neither the United States Supreme Court nor the Kentucky Supreme Court has ruled on the constitutionality of a similar sanction for failure to provide pretrial disclosure. Even though preclusion may survive constitutional attack because it is discretionary rather than mandatory,[220] application of the provision to a specific case may constitute reversible error as an infringement on the accused's sixth and fourteenth amendment rights. This would be true if the trial court precluded evidence without finding actual and substantial surprise on the part of the prosecution or without examining alternatives other than exclusion to alleviate that surprise.[221]

The federal rules, unlike the Kentucky rules, further permit the court to exclude testimony of undisclosed alibi witnesses. Such exclusion of witnesses, as has already been discussed, may violate the accused's right to compulsory process and his right to present a defense. The federal rule never limits the right of the defendant to testify in his own behalf.

Under the sanctions of Kentucky Revised Statutes (KRS) § 504.050 (1) and Federal Rule 12.2(a), the defense of insanity is absolutely barred upon failure of the defendant to give notice of his intent to present such a defense. This absolute sanction is arguably in conflict with the *Washington*[222] case which guarantees the right to present such a defense under the sixth amendment.[223] The federal rules, unlike Kentucky's, also per-

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[218] *But see Pattern Rules, supra* note 128, at § 7-3.7.

[219] ABA STANDARDS, DISCOVERY, *supra* note 4, Commentary at 108.

[220] *See* text accompanying notes 114 to 116 *supra*.

[221] Comment, *Expansion of Discovery, supra* note 5, at 43.

[222] FED. R. CRIM. P. 12.1(d). This rule in no event limits the right of the defendant to testify in his own behalf.

[223] Washington v. Texas, 388 U.S. 14 (1967).

mit exclusion of the defense's expert testimony[224] if he fails to inform the prosecution that he intends to use an expert.[225]

IV. STRATAGEMS FOR PRETRIAL DISCOVERY UNDER KENTUCKY LAW

Because criminal pretrial discovery rules are generally limited,[226] defense attorneys use other devices to gather information before trial—devices which were not created specifically for discovery.[227] One of the best discovery opportunities for the defense before trial is the preliminary hearing.[228] At the hearing the prosecutor must establish a prima facie case against the defendant.[229] This gives the defense an opportunity to learn the prosecution's theory of the case and to cross-examine its witnesses.[230] Moreover, in Kentucky, once granted a preliminary hearing the defendant is entitled to have a transcript or minutes of the hearing,[231] which can be used at trial for impeachment purposes. Of course, the defense is not obligated to produce any witnesses or present any defense at this time. The importance of this discovery aspect of the preliminary hearing

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[224] Comment, *Expansion of Discovery, supra* note 5, at 31.

[225] FED. R. CRIM. P. 12.2(b). This exclusion is limited to expert witnesses; it does not apply to laymen. FED. R. CRIM. P. 12.2(d).

[226] The scope of discovery rules varies significantly from state to state. *See* Zagel & Carr, *State Criminal Discovery, supra* note 30. For an examination of some of those states' experiences in criminal discovery see Gaynor, *Defendant's Right of Discovery in Criminal Cases*, 20 CLEVE. ST. L. REV. 31 (1971) (discussion of criminal discovery in Ohio); Langrock, *Vermont's Experiment in Criminal Discovery*, 53 A.B.A.J. 732 (1967); Roether, *Criminal Discovery in Michigan: The Pursuit of Justice*, 50 J. URBAN L. 751 (1973); Shatz, *California Criminal Discovery: Eliminating Anachronistic Limitations Imposed on the Defendant*, 9 U. SAN FRAN. L. REV. 259 (1974); Tessner, *Discovery in Texas Criminal Cases*, 28 TEX. B.J. 855 (1965); Note, *Criminal Discovery-Comparison of Federal Discovery and the ABA Standards with the New Statutory Provisions in Wisconsin*, 1971 WISC. L. REV. 614; Comment, *Criminal Discovery in Louisiana*, 42 TUL. L. REV. 620 (1968); Comment, *Criminal Discovery, A Proposal for Rules in Oklahoma*, 5 TULSA L.J. 193 (1968); Comment, *Pre-trial Discovery in Criminal Cases*, 17 WYO. L.J. 192 (1963) (discussing criminal discovery in Wyoming).

[227] *See generally* MURRELL, *supra* note 132, at 74-89; A. MOENSSENS & R. MOSES, F. INBAU, SCIENTIFIC EVIDENCE IN CRIMINAL CASES 29-58 (1973).

[228] *But see* Pankey v. Commonwealth, 485 S.W.2d 513, 518 (Ky. 1972) (the preliminary hearing is not a discovery device).

[229] *See generally* Note, *The Function of the Preliminary Hearing in Federal Pretrial Procedure*, 83 YALE L.J. 771 (1974).

[230] KY. R. CR. 3.10(2).

[231] KY. R. CR. 3.16.

was, in fact, one reason the U.S. Supreme Court has ruled that such a hearing is a "critical stage" requiring the presence of counsel.[232]

The significance of the preliminary hearing as a discovery device, however, can be overestimated. Because the prosecutor is not required to reveal all his evidence, he tends to put on as few witnesses as possible.[233] Furthermore, the Kentucky Court has held that once a defendant is indicted, he is no longer entitled to a preliminary hearing and has no right to demand one.[234] Thus, the prosecution can avoid the preliminary hearing entirely by direct submission of the case to the grand jury.

Hearings on motions to set or reduce the amount of bail have also been used by defense attorneys in Kentucky to gather pretrial information. The usefulness of this device was underscored by the Kentucky Court of Appeals, now the Supreme Court of Kentucky, in *Kuhnle v. Kassulke*.[235] In this case the Court ruled that reversible error was committed in prohibiting the defendant from calling the chief prosecution witness, the victim, at the bail hearing. This decision was based on a rule which required a court to consider, *inter alia*, "the nature and circumstances of the offense charged" and "the weight of evidence against the defendant"[236] in determining the amount of bail, a determination which, the defendant argued, required the prosecuting witness's testimony. Since *Kuhnle* was de-

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[232] [T]he skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial . . . . [T]rained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Coleman v. Alabama, 399 U.S. 1, 9 (1970).

[233] E. REMINGTON, D. NEWMAN, E. KIMBALL, M. BELLI, H. GOLDSTEIN, CRIMINAL JUSTICE ADMINISTRATION 526-27 (1969).

[234] In Caine v. Commonwealth, 491 S.W.2d 824 (Ky. 1973), the preliminary hearing was continued on a motion of the Commonwealth and in the interim the prosecution obtained an indictment against the defendant. The Court of Appeals held that failure to hold a preliminary hearing at that point did not deny defendant any of his constitutional rights. *See also* Blackmore v. Commonwealth, 497 S.W.2d 231, 235 (Ky. 1973); Pankey v. Commonwealth, 485 S.W.2d 513, 518 (Ky. 1972); Jenkins v. Commonwealth, 477 S.W.2d 795, 797 (Ky. 1972); Maggard v. Commonwealth, 394 S.W.2d 893, 894 (Ky. 1965).

[235] 489 S.W.2d 833 (Ky. 1973).

[236] KY. R. CR. 4.06, superseded by amendments of June 21, 1976. *See* text accompanying note 237 *infra*.

cided, however, this rule has been changed pursuant to the recent reform of Kentucky's bail bond system.[237] Nevertheless, the rules still require that the amount of bail be "commensurate with the nature of the offense charged."[238] Thus, the new rule appears to continue to support the rationale of *Kuhnle*.[239]

Although a bill of particulars[240] is not to be used for discovery of evidence, it must be granted "to provide information fairly necessary to enable the accused to understand and prepare his defense against the charges without prejudicial surprise upon trial."[241] The bill of particulars becomes even more important with the introduction of the abbreviated indictment in Kentucky, an indictment which only informs the defendant of the nature of the charge and does not detail the essential factual elements.[242] The bill of particulars complements the indictment, and together they need only meet the standard for a constitutionally adequate indictment.[243] The bill must inform the defendant of the charge's basic facts and must be more

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[237] KRS § 431.525(1)(c)(Supp. 1970).

[238] KY. R. CR. 4.16 (amended by Supreme Court order issued June 21, 1976); this rule issued pursuant to KRS § 431.525(1)(c)(Supp. 1976).

[239] Kuhnle v. Kassulke, 489 S.W.2d 833 (Ky. 1973).

[240] KY. R. CR. 6.22. *See also* FED. R. CRIM. P. 7(f); Kampfe, *supra* note 12, which discussed the uses of federal bill of particulars.

[241] Brown v. Commonwealth, 378 S.W.2d 608, 610 (Ky. 1964). *See also* Russell v. Commonwealth, 490 S.W.2d 726, 727 (Ky. 1973); James v. Commonwealth, 482 S.W.2d 92, 93 (Ky. 1972); Finch v. Commonwealth, 419 S.W.2d 146, 147-48 (Ky. 1967).

[242] KY. R. CR. 6.10. The rationale upon which the concept of the shortened indictment rests is stated in Finch v. Commonwealth, 419 S.W.2d 146 (Ky. 1967):

> The theory of the new rules of criminal procedure is that if the defendant needs information concerning the details of the charge against him to enable him to prepare his defense he should be supplied them through a requested bill of particulars, rather than that a requirement be made that every indictment set forth all details of the charge. *Id.* at 147.

[243] The standard for a constitutionally adequate indictment was defined in United States v. Debrow, 346 U.S. 374, 376 (1953). Here the Supreme Court, quoting prior cases said:

> The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.' *Cochran and Sayre v. United States*, 157 U.S. 286, 290; *Rosen v. United States*, 161 U.S. 29, 34. *Hagner v. United States*, 285 U.S. 427, 431. *Cf.* United States v. Anderson, 447 F.2d 833 (8th Cir. 1971); E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 352-53 (1973 ed.).

than "cursory . . . in purported obedience to the court's order requiring that the bill be supplied."[244] In reality this discovery tool is quite limited and generally reveals only the bare charges against the defendant.[245] In addition, the Kentucky Court of Appeals has specifically held that "particulars should not be required when the motion appears to be merely an exploratory maneuver or when the accused apparently has knowledge of the facts or where the means of obtaining the facts are just as accessible to him as to the prosecution."[246]

There are various other pretrial motions raising defenses or objections which may require hearings resulting in discovery of the prosecution's evidence.[247] These include motions to suppress evidence as fruits of an illegal search or arrest, thus placing a burden on the prosecution to demonstrate probable cause for the search or arrest,[248] motions to suppress illegally obtained confessions, motions to dismiss, motions to "reveal the deal" between the prosecution and codefendants,[249] and motions challenging a witness's identification of the defendant. Hearings on motions require a factual determination and sometimes allow the defense an opportunity to cross-examine prosecution witnesses.[250] But in making such motions the defendant must show support for his allegations.[251] Moreover, the drawbacks of using these motions for discovery are obvious. Because they were not developed for this purpose, their use as discovery devices is cumbersome, and multiple motions further clog already crowded trial dockets causing needless delay. What is needed is the development of discovery rules made solely for that purpose. This would meet the defendant's discovery needs more efficiently.

Both the federal and Kentucky rules also provide for open-ended pretrial conferences to "consider such matters as will

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[244] Davis v. Commonwealth, 464 S.W.2d 250, 252 (Ky. 1970).

[245] *See* Yankwich, *Concealment or Revealment?*, 3 FRD 209, 210 (1944).

[246] Deskins v. Commonwealth, 512 S.W.2d 520, 524 (Ky. 1974) *citing* Harris v. Commonwealth, 285 S.W.2d 489, 492 (Ky. 1956).

[247] KY. R. CR. 8.16 through 8.22. MURRELL, *supra* note 154, at 84.

[248] Freeman v. Commonwealth, 425 S.W.2d 575 (Ky. 1967). *See also* United States v. Schipani, 289 F. Supp. 43 (E.D.N.Y. 1968).

[249] *See* Giglio v. United States, 405 U.S. 150 (1972).

[250] Shull v. Commonwealth, 475 S.W.2d 469, 472 (Ky. 1971).

[251] Lumpkins v. Commonwealth, 425 S.W.2d 535 (Ky. 1968).

promote a fair and expeditious trial."[252] Although the potential of these conferences as independent sources of discovery has not been developed, it has been suggested that they afford the court an opportunity to consider such matters as whether the names of government witnesses should be disclosed prior to trial and whether witnesses' statements should be mutually inspected.[253]

Another avenue for discovery, although it is quite limited, was established by the United States Supreme Court in *Brady v. Maryland*.[254] In *Brady*, the Court held that due process required the government to disclose upon a request for specifics by the defense, any evidence "favorable to an accused . . . where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[255] The *Brady* requirement of prosecutorial disclosure has significant limitations with regard to pretrial discovery, however. First, *Brady* does not mandate disclosure before trial, although it does require that the material be disclosed at such time or under such conditions as will enable the defense to make use of the evidence.[256] Second, even if there is a specific request, the prosecution initially decides the "materiality" of the evidence, leaving a great deal to prosecutorial discretion.[257] There are,

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[252] FED. R. CRIM. P. 17.1; KY. R. CR. 9.08.

[253] Rezneck, *The New Federal Rules of Criminal Procedure*, 54 GEO. L.J. 1276, 1279-99 (1966).

[254] 373 U.S. 83 (1963).

[255] *Id.* at 87. *See also* Moore v. Illinois, 408 U.S. 786 (1972); Giles v. Maryland, 386 U.S. 66 (1967); Miller v. Pate, 386 U.S. 1 (1967); Pyle v. Kansas, 317 U.S. 213 (1942) (pre-*Brady* case in which the Court held that the prosecutor could not suppress evidence favorable to the accused); Napue v. Illinois, 360 U.S. 264 (1959) (pre-*Brady* case holding that a prosecutor must correct the testimony of witness even though such testimony only bears on the credibility of another witness); Arthur v. Commonwealth, 307 S.W.2d 182 (Ky. 1957).

[256] Clay v. Commonwealth, 454 S.W.2d 109, 110 (Ky. 1970), *cert. denied*, 400 U.S. 943 (1970). *See also* Davis v. Commonwealth, 463 S.W.2d 133 (Ky. 1970).

[257] ABA STANDARDS, DISCOVERY, Commentary at 73 (Approved Draft, 1970); Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228, 242, at n. 77 (1964). *See also* Cannon, *Prosecutor's Duty to Disclose*, 52 MARQ. L. REV. 516 (1969); Note, *Implementing Brady v. Maryland: An Argument for a Pretrial Open File Policy*, 43 U. CIN. L. REV. 889 (1974); Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 YALE L.J. 136 (1964); Comment, *Brady v. Maryland and the Prosecutor's Duty to Disclose*, 40 U. CHI. L. REV. 112 (1972).

At least one state court has stated that the prosecutor should at least disclose the exculpatory material to the trial judge when there is doubt as to its nature. State v.

however, safeguards against prosecutorial abuse since government attorneys can face disciplinary proceedings for withholding exculpatory evidence[258] and since failure to disclose material, exculpatory evidence will result in mistrial or reversal. A prosecutor can protect himself and the verdict by submitting such questions of "materiality" to the judge *before* trial as has been suggested by the U.S. Supreme Court.[259] The Court has even gone so far as to state that: "When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable."[260]

A further limitation on the use of the *Brady* rule for discovery is the narrow definition of "materiality" established by the Court in *United States v. Agurs*.[261] In *Agurs* the Court held that before failure to disclose evidence results in constitutional error as a denial of due process under the fifth and fourteenth amendments, the omitted evidence must be viewed in the context of the whole record and must create "a reasonable doubt that did not otherwise exist."[262] The Court did recognize, however, that in close cases, "additional evidence of relatively minor importance might be sufficient to create a reasonable doubt."[263] Heretofore, it had been suggested that the logical extension of *Brady* required disclosure of any evidence which

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Giles, 212 A.2d 101, 109 (Md. 1965) *also quoted* in Giles v. Maryland, 386 U.S. 66, 80 (1967).

The reverse question is more problematic: To what extent does defense counsel have a duty to disclose incriminating evidence? In State *ex rel* Sowers v. Olwell, 394 P.2d 681 (Wash. 1964), defense counsel obtained a knife belonging to the defendant and apparently used in the homicide with which he was charged. The state supreme court held that due to the attorney-client privilege, the attorney could not be required to disclose how he got the knife; however, he did have an obligation to turn the weapon over to the prosecution.

[258] Code of Professional Responsbility, DR 7-101 (b).

> A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. *See also* ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, THE PROSECUTION FUNCTION §3.11 (1970).

[259] United States v. Agurs, -U.S.-, 96 S.Ct. 2392, 2399 (1976).

[260] *Id.*

[261] *Id.*

[262] *Id.* at 2401.

[263] *Id.* at 2402.

might have aided the defense or affected the outcome of the trial.[264] The Court specifically rejected this interpretation and further stated that it would not require the prosecution as a matter of constitutional law "routinely to deliver his entire file to defense counsel."[265] The two lone dissenters in the case, Marshall and Brennan, objected to the standard proposed by the majority because, they charged, the rule "reinforces the natural tendency of the prosecutor to overlook evidence favorable to the defense"[266] and leaves the question of reasonable doubt not to the jury but to the reviewing judge.[267] The majority argued that rather than suppressing possible material evidence the "prudent prosecutor" would resolve questions in favor of disclosure.[268] It should also be noted that *Agurs* established a constitutional duty upon the prosecutor to provide material, exculpatory evidence regardless of whether the defense has made a request for all "exculpatory" or "Brady" material.[269]

Finally, it should be recognized that many prosecutors are willing to make voluntary pretrial disclosures. Prosecutors most often disclose material to defendants because they trust the defense counsel with whom they have a good working relationship or they believe disclosure will lead to a guilty plea.[270]

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[264] *See* n. 257, *supra*.

[265] United States v. Agurs, -U.S.-, 96 S.Ct. 2392, 2401 (1976).

[266] *Id.* at 2404 (Marshall & Brennan, JJ., dissenting).

[267] *Id.*

[268] Id. at 2399.

[269] *Id.*

[270] In a survey of 14 assistant United States Attorneys and 17 defense counsels in the District of Columbia, the following were factors most often thought to have a substantial affect on the prosecutor's decision as to whether to grant informal discovery:

	Prosecutor	Defense Counsel
1. U.S. Attorney's personal acquaintance with defense counsel		
2. Likelihood of a guilty plea	79%	94%
3. Material available by formal motion	79%	52%
4. Defendant's willingness to disclose his defenses	57%	53%
5. Preponderance of evidence against the defendant	57%	82%
6. Defendant's ability to get the same information elsewhere		
7. U.S. Attorney's opinion of defendant's guilt	29%	24%
8. Availability of material under the Jencks Act	21%	24%
9. Indigency of defendant	7%	53%

Such a system of informal pretrial discovery appears arbitrary and capricious on its face.[271] Furthermore, as noted by Justice Brennan, this "system" has definite "overtones of denial of equal protection . . . . [T]he opportunity for discovery on equal terms should either be the right of all accused, or the right of none."[272]

The prosecution also has discovery devices outside the specific discovery rules. As already discussed, the Commonwealth has vast investigatory resources at its disposal, as well as the grand jury procedure by which it can subpoena witnesses and compel testimony.[273] Because grand jury proceedings are secret,[274] the prosecutor has an opportunity to explore the case outside the presence of the defendant.

Discovery in Federal Criminal Cases, 33 F.R.D. 41, 116 (1963). *See also* Comment, *In Search of the Adversary System—The Cooperative Practices of Private Criminal Defense Attorneys*, 50 TEX. L. REV. 60 (1971).

[271] The whimsical nature of this type of voluntary disclosure was underlined by one prosecutor who stated that whether he makes disclosures "depends largely on the type of case and the type of defendant." No other criteria were suggested. Flannery, *supra* note 33, at 74-82. Moreover, the informality of this procedure was stressed in the following testimony:

> Legal Aid attorneys will never press for a preliminary hearing, and never even make a discovery motion of any kind. But because of the relationship of trust and confidence that exists between the particular men who are there representing the defendants through the Legal Aid Society and the assistants (to the federal prosecutor), there is a great deal of informal discovery, and I do mean informal. It is a matter of sitting in a lunchroom and the Legal Aid attorney saying, what do you have on so and so, and the Assistant U.S. Attorney will tell him.

Hearings on the United States Commissioner System Before The Subcommittee on Improvements in Judicial Machinery of The Senate Committee on the Judiciary, 89th Cong., 2d Sess. pt. 3, at 223-24 (1966). Such informality smacks of wheeling and dealing in the "good ole boys" club. One must wonder whether women, blacks and other minority attorneys who are not traditional members of this "club" fare so well on behalf of their clients. For a discussion of the "Old Boys Act," a procedure of informal prosecutorial disclosure used in England, see Traynor, *Ground Lost and Found in Criminal Discovery in England*, 39 N.Y.U.L. REV. 749, 767 (1964).

[272] Brennan, *Remarks on Discovery*, *supra* note 37, at 58-59.

[273] Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1191 (1960). The prosecution can subpoena witnesses before the grand jury, KY. R. CR. 5.06, and compel their testimony. KY. R. CR. 5.12.

[274] KY. R. CR. 5.18, 5.24. *See also* Blakemore v. Commonwealth, 497 S.W.2d 231, 235 (Ky. 1973); Vaughan v. Commonwealth, 485 S.W.2d 497, 498 (Ky. 1972).

V. CONCLUSION

Few seriously dispute the value of pretrial discovery in ensuring that truth and not the best gamesman wins out in the courtroom. The inequity of continuing a criminal justice system in which surprise is too often the rule is evident. Unfairness always calls to question the integrity of the system and thus the soundness of the justice it metes out. A mature society cannot tolerate criminal prosecution being conducted as a game. To take such a frivolous approach to the adjudication of criminal cases invites disillusionment with and disrespect for the entire criminal justice system and the goals it espouses.

The real issue, however, is not the inherent value or need for criminal discovery. Nor is it the elimination of gamesmanship from the adjudication process; these are generally accepted. The basic issue today is the extent of criminal discovery and the conditions to be placed upon it.

Comparison of the Kentucky rules of criminal discovery with the federal rules and ABA standards reveals that Kentucky criminal discovery is not yet as broad as the ABA standards, especially in the area of disclosure of names and statements of prospective prosecution witnesses to the defense, but that it is commensurate with the defense discovery available in the federal system. While the "surprise witness" is still a possibility in Kentucky courts, criminal discovery is broad enough to prevent the defendant's total surprise at trial.

Kentucky's criminal discovery scheme differs most significantly from the ABA standards and federal rules in the area of discovery by the prosecution. While the ABA standards view prosecution discovery as a necessary trade-off in return for broader defense discovery,[275] the federal rules have granted broader prosecution discovery, the alibi notice rule, for example, without giving any significantly broadened opportunities for discovery by the defense.

Kentucky has at times patterned its rules of criminal procedure on the federal rules.[276] On the issue of prosecution dis-

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[275] ABA STANDARDS, DISCOVERY, *supra* note 4, at Supplement 3-6.

[276] *See* James v. Commonwealth, 482 S.W.2d 92, 94 at n. 1 (Ky. 1972) in which the Kentucky Court acknowledged that "Federal Rule 16(a) is almost identical with [Kentucky Criminal Rule] 7.24(1)."

covery, however, it would be the wiser course not to follow the federal lead. As for the ABA standards, the courts and defense bar must consider whether broader defense discovery is worth the price of greater prosecution discovery. Probably it is not. Rather, the Kentucky Court should adopt a philosophy of liberal criminal discovery to insure that cases are decided upon truth and not upon tactical surprises without adopting rules which would erode the safeguards of the privilege against self-incrimination.

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