Denver Law Review

Volume 66 | Issue 1 Article 7

February 2021

Limiting Prosecutorial Discovery under the Sixth Amendment Right to Effective Assistance of Counsel: Hutchinson v. People

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LIMITING PROSECUTORIAL DISCOVERY UNDER THE SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL: *HUTCHINSON V. PEOPLE*

I. INTRODUCTION

This comment examines the Colorado Supreme Court's recent decision in *Hutchinson v. People*.[1] Part I of the Comment addresses the facts of the case. Part II then explores the background out of which the legal issues of the case arise. Part III addresses the reasoning adopted by the court, and Part IV focuses upon a general analysis of the court's decision. While reference is made to a variety of sources, such as the Rules of Criminal Procedure and leading United States Supreme Court decisions, particular emphasis is placed on Colorado law.

I. FACTS

In *Hutchinson*, the Colorado Supreme Court granted certiorari to review the defendant's convictions for second-degree forgery and conspiracy to commit second-degree forgery.[2] The charges against the defendant arose when he obtained deposit slips from a bank and then allegedly forged the writing on two checks which he presented for payment twice. The defendant denied that he wrote the checks or knew that they were invalid. Hence, a critical issue in the case involved the identity of the person who wrote the checks and the deposit slips.[3]

The defense was permitted to retain, at state expense, a handwriting expert who conducted an independent analysis of the handwriting evidence. The expert's findings were generally unfavorable to the defendant's case, and therefore, the defense decided not to call the expert as a witness.[4]

Prior to trial, however, the prosecution sought a ruling allowing it to call the defense-retained expert to the stand. The trial court denied the prosecution's request, and the case proceeded to trial. A mistrial was declared when the jury was unable to reach a verdict.[5]

Prior to the second trial, the trial court reversed its decision regarding the prosecution's use of the expert. The court allowed the prosecution to use the defense's expert in its case-in-chief, and at the second trial, the defendant was found guilty on all counts.[6]

The Colorado Court of Appeals upheld the trial judge's decision in

1. 742 P.2d 875 (Colo. 1987).
2. COLO. REV. STAT. §§ 18-2-201, 18-5-103 (1986).
3. 742 P.2d at 877.
4. *Id.* at 877-78.
5. *Id.* at 878.
6. *Id.* at 878-79.

an unpublished decision.[7] However, in a precedent setting decision, the Colorado Supreme Court reversed and held that the prosecution's use of the defense-retained expert in its case-in-chief violated the defendant's constitutional right to effective assistance of counsel.[8]

II. LEGAL BACKGROUND

A. *Expansion of Prosecutorial Discovery*

The issues presented in *Hutchinson* arose out of a modern trend permitting and expanding prosecutorial discovery of a defendant's case. Such discovery was once believed to be barred by the defendant's privilege against self-incrimination. Under this privilege, the prosecution was required to carry the burden of proof without any assistance from the defendant.[9]

Relatively recent judicial and legislative actions radically altered those traditional views. Liberal discovery procedures on both sides of a criminal case are now an accepted means of encouraging and promoting the truth-seeking process.[10]

1. Discovery under the Rules of Criminal Procedure

Rule 16 of the Federal and Colorado Rules of Criminal Procedure have had a profound impact on prosecutorial discovery.[11] Both rules afford the prosecution fairly broad discovery rights.

If the defendant has requested discovery, the federal rule permits the prosecution to obtain documents and tangible objects in the defendant's possession or control which the defendant intends to introduce into evidence at trial.[12] The federal rule also allows discovery of any results or reports of examinations and tests made in connection with the case.[13]

The Colorado rule is somewhat broader than its federal counterpart and does not contain the express limitations set forth in the federal rule.[14] The state rule permits prosecutorial discovery of medical and

7. According to the Colorado Supreme Court, the court of appeals relied on People v. Perez, 701 P.2d 104 (Colo. App. 1985), in upholding the trial judge's decision to allow a prosecutor to use a defense expert.

8. 742 P.2d at 876.

9. *See generally* Allis, *Limitations on Prosecutorial Discovery of the Defense Case in Federal Courts: The Shield of Confidentiality*, 50 S. CAL. L. REV. 461 (1977); Nakell, *Criminal Discovery for the Defense and the Prosecution—The Developing Constitutional Considerations*, 50 N.C.L. REV. 437, 479-81 (1972); Van Kessel, *Prosecutorial Discovery and the Privilege Against Self-Incrimination: Accommodation or Capitulation*, 4 HASTINGS CONST. L.Q. 855 (1977).

10. *See, e.g.*, FED. R. CRIM. P. 16; COLO. R. CRIM. P. 16; People v. District Ct., 187 Colo. 333, 531 P.2d 626 (1975).

11. *See infra* note 14.

12. FED. R. CRIM. P. 16(b)(1)(A).

13. FED. R. CRIM. P. 16(b)(1)(B).

14. COLO. R. CRIM. P. 16 II does not contain a reciprocal requirement nor does it contain an express provision precluding discovery of defense counsel's work product. *Compare* FED. R. CRIM. P. 16(b)(2) (precludes discovery of work product of defendant, his attorneys or agents).

scientific reports made in connection with the case,[15] the nature of any defense which the defendant intends to use at trial,[16] and notice of an alibi defense, along with the names and addresses of any supporting witnesses.[17] The rule has survived constitutional attack and has been heralded as an effective means of removing the "cloak of secrecy" from the criminal justice process.[18]

2. United States Supreme Court Decisions

The United States Supreme Court has not decided if the prosecution's use in its case-in-chief of a defense-retained expert violates the defendant's constitutional rights. However, in several cases, the Court has expressed its approval of increased prosecutorial discovery under certain circumstances.

In *Williams v. Florida*,[19] the Supreme Court upheld the constitutionality of a Florida notice-of-alibi statute which required a defendant, who intended to rely on an alibi defense, to provide information to the prosecution regarding the time and place of the alibi and the names and addresses of any supporting witnesses.[20] In holding that the rule did not violate the defendant's privilege against self-incrimination, the Court reasoned that, at most, the rule only accelerated the timing of the defendant's disclosure of an alibi defense.[21]

The Court maintained that the adversary system is not an end in itself and "is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played."[22] Hence, the Court approved the Florida rule as a means of enhancing the search for truth, providing both the defendant and the prosecution ample opportunity to investigate crucial facts of the case.[23]

In a separate opinion, Justice Black strongly argued that the notice-of-alibi rule violated the defendant's privilege against self-incrimination.[24] Justice Black adhered to the traditional view that the prosecution must carry the entire burden of proof without any assistance from the defendant. He stated that the defendant has an absolute right to remain silent, "in effect challenging the State at every point to: 'Prove it!' "[25]

In the 1973 *Wardius v. Oregon*[26] decision, the Court again considered the constitutionality of a notice-of-alibi rule. In this case, the Court held that an Oregon alibi rule was unconstitutional under the due pro-

15. COLO. R. CRIM. P. 16 II(b).
16. COLO. R. CRIM. P. 16 II(c).
17. COLO. R. CRIM. P. 16 II(d).
18. People v. District Ct., 187 Colo. 333, 338, 531 P.2d 626, 629 (1975).
19. 399 U.S. 78 (1970), *aff'g*, 224 So.2d 406 (Fla. Dist. Ct. App. 1969).
20. 399 U.S. at 78.
21. *Id.* at 85.
22. *Id.* at 82.
23. *Id.* The Court noted that the Florida notice-of-alibi rule was "carefully hedged with reciprocal duties requiring state disclosure to the defendant." *Id.* at 81.
24. *Id.* at 106-16 (Black, J., concurring in part and dissenting in part).
25. *Id.* at 112 (Black, J., concurring in part and dissenting in part).
26. 412 U.S. 470 (1973), *rev'g*, 6 Or. App. 391, 487 P.2d 1380 (1971).

cess clause of the fourteenth amendment[27] because it required the defendant to disclose alibi information, but did not give the defendant reciprocal discovery rights.[28] The Court maintained that it would be fundamentally unfair to require the defendant to divulge information of his case while subjecting him to possible surprises from the prosecution regarding the information he disclosed.[29] Nonetheless, the Court again expressed its approval of liberal discovery procedures as a "salutary development which . . . enhances the fairness of the adversary system," and stated that discovery must usually be a two-way street.[30]

Finally, in the 1975 *United States v. Nobles*[31] decision, the Supreme Court held that defense counsel could be compelled to disclose relevant portions of a defense investigator's report after counsel had introduced limited portions of the report in order to impeach prosecution witnesses.[32] The Court determined that the fifth amendment did not bar disclosure of the report since the privilege is personal to the defendant and does not extend to the testimony or statements of third parties.[33] Furthermore, the Court reasoned, disclosure was not prohibited by the work product doctrine, as the defense waived the privilege by electing to call the investigator as a witness.[34]

The Court addressed, in a footnote, the defendant's claim that his sixth amendment right to effective assistance of counsel was violated.[35] The basis of the claim was that disclosure of the defense investigator's report compromised counsel's ability to thoroughly investigate and prepare for the case, impaired the relationship of trust and confidence between the client and attorney, and inhibited counsel from gathering important information. The Court rejected the claim, maintaining that the defense voluntarily elected to make testimonial use of the investigator's report. The discovery order was also limited to relevant portions of the report.[36] While the Court dispensed with the claim, at least one commentator has argued that *Nobles* laid the foundation for a sixth amendment challenge to prosecutorial discovery of a defense witnesses' statements.[37]

3. Colorado Decisions

Colorado courts have also followed the United States Supreme Court trend of allowing increased prosecutorial discovery. In *People v.*

27. U.S. CONST. amend. XIV.
28. 412 U.S. at 472.
29. *Id.* at 476.
30. *Id.* at 474-75. The Court stated, however, that if there is any imbalance in discovery rights, it should work in the defendant's favor. *Id.* at 475-76 n.9 (quoting Note, *Prosecutorial Discovery under Proposed Rule 16*, 85 HARV. L. REV. 994, 1018-19 (1972)).
31. 422 U.S. 225 (1975), *rev'g*, 501 F.2d 146 (9th Cir. 1974).
32. 422 U.S. at 227-29.
33. *Id.* at 234.
34. *Id.* at 238-39.
35. *Id.* at 240 n.15.
36. *Id.*
37. *See* Blumenson, *Constitutional Limitations on Prosecutorial Discovery*, 18 HARV. C.R.-C.L. L. REV. 122, 175 (1983).

District Court[38] decision, the Colorado Supreme Court held that Rule 16 of the Colorado Rules of Criminal Procedure is constitutionally valid on its face. In examining the breadth and scope of the rule, the court determined that while the rule recognizes that the prosecution has a right to discovery, the court will not grant discovery if it forces the defendant to relinquish his right to obtain discovery or disclose information which will not be used at trial.[39] The court emphasized that limitless discovery might be unconstitutional and that a trial court ruling on a prosecution's discovery request must first decide if the discovery would violate the defendant's rights.[40]

In the 1981 decision of *People v. Small*,[41] the Colorado Supreme Court reached a similar decision as the United States Supreme Court reached in *Nobles*.[42] In *Small*, the court ruled that it was proper for the prosecution to use a defense investigator's report after defense counsel introduced at trial limited portions of the report. The court held that neither the defendant's privilege against self-incrimination nor the defendant's privilege under the work product doctrine were violated.[43] The court adhered to the modern view that criminal discovery promotes accuracy and efficiency in the fact-finding process and should not be a "one-way street flowing in the direction of the defense."[44]

The cases discussed above clearly illustrate that courts are allowing increased discovery in criminal cases.[45] However, their desire to liberalize discovery must be balanced against the constitutional privileges afforded to defendants.

B. *Limitations on Prosecutorial Discovery*

1. The Privilege Against Self-Incrimination

Courts once widely accepted that the defendant's privilege against self-incrimination barred prosecutorial discovery.[46] Today the privilege does not automatically preclude prosecutorial discovery. The privilege does, however, remain a very powerful constitutional limitation on the permissible boundaries of prosecutorial discovery. In *People v. District Court*,[47] for example, the Colorado Supreme Court emphasized that the prosecution's discovery requests must be denied if they require a defendant to relinquish his right against self-incrimination.[48]

38. 187 Colo. 333, 531 P.2d 626 (1975).
39. 187 Colo. at 341, 531 P.2d at 630.
40. *Id.* at 343, 531 P.2d at 632.
41. 631 P.2d 148 (Colo. 1981), *cert. denied*, 454 U.S. 1101 (1981).
42. *See supra* note 36 and accompanying text.
43. 631 P.2d at 158-59.
44. *Id.* at 158 (citations omitted).
45. *See also* Annotation, *Right of Prosecution to Discovery of Case-Related Notes, Statements, and Reports-State Cases*, 23 A.L.R. 4th 799 (1983) (for a collection of state cases regarding prosecution's right to discovery in a criminal case).
46. *See supra* note 13.
47. 187 Colo. 333, 531 P.2d 626 (1975).
48. *Id.* at 341, 531 P.2d at 630.

The Colorado Supreme Court has held that the prosecution's use of a defense-retained expert violates the defendant's privilege against self-incrimination. In both *People v. Rosenthal*[49] and *People v. Roark*,[50] the court ruled that the prosecution could not call as a witness in its case-in-chief a psychiatrist retained by the defendant in order to obtain incriminating admissions made by the defendant during a pretrial sanity investigation.[51] In *Rosenthal*, the court recognized that such a result would deter the cooperation and candidness necessary for effective diagnosis, which might in turn, adversely affect the reliability of opinion evidence in the fact finding process.[52]

The defendant in *Hutchinson* argued that the prosecution's use of handwriting samples obtained by the defense-retained expert and its testimonial use of the defense expert violated his privilege against self-incrimination.[53] However, handwriting samples are considered an identifying physical characteristic, and not within the privilege.[54] Statements of third-party witnesses, such as an expert, also do not come within the privilege.[55] Although the privilege against self-incrimination protects the defendant from certain prosecutorial discovery, the court in *Hutchinson* did not rely on the self-incrimination privilege, in reaching its decision.

2. The Work Product Doctrine

In some cases, the work product doctrine is another limitation which may provide protection from prosecutorial discovery. The doctrine provides a limited and qualified privilege against pretrial discovery of documents and tangible items prepared in anticipation of litigation.[56]

Courts have recognized that while the work product doctrine is primarily intended to protect the work product of the attorney, it also extends to the attorney's agents.[57] As the Supreme Court reasoned in *Nobles*, one of the realities of litigation is that attorneys must rely on investigators and other agents in preparation for trial. This requires protecting materials prepared by the agent as well as by the attorney.[58]

In *Hutchinson*, the defendant argued that disclosure of handwriting samples, as well as testimonial statements, opinions and conclusions of the defense expert, violated the privilege afforded by the work product

49. 617 P.2d 551 (Colo. 1980).

50. 643 P.2d 756 (Colo. 1982).

51. 617 P.2d at 555; 643 P.2d at 769.

52. 617 P.2d at 556.

53. Petitioner's Opening Brief at 21-25, Hutchinson v. People, 742 P.2d 875 (Colo. 1987) (No. 85SC510).

54. *See, e.g.*, People v. District Ct., 187 Colo. 333, 340, 531 P.2d 626, 630 (1975).

55. *See, e.g.*, United States v. Nobles, 422 U.S. 225, 234 (1975); People v. Small, 631 P.2d 148, 158, *cert. denied*, 454 U.S. 1101 (1981).

56. *See, e.g.*, Hickman v. Taylor, 329 U.S. 495 (1947); A. v. District Court, 191 Colo. 10, 550 P.2d 315 (1976), *cert. denied*, 429 U.S. 1040 (1977).

57. *See, e.g.*, *Nobles*, 422 U.S. at 225 (1975).

58. *Id.* at 238.

doctrine.[59] However, the court did not extend the privilege to the instant case since handwriting examples are not privileged nor confidential.[60]

3. The Attorney-Client Privilege

The attorney-client privilege provides another significant limitation upon prosecutorial discovery.[61]

Generally, the privilege extends only to confidential communications made by or to a client in the course of obtaining legal counsel, advice, or direction.[62]

Colorado courts have held that the attorney-client privilege may extend to communications between the client and an agent of the client's attorney. In *Miller v. District Court*,[63] the Colorado Supreme Court held that a defense-retained psychiatrist is an agent of defense counsel and thus comes within the protection of the attorney-client privilege.[64] The court recognized that consultation with an expert, such as a psychiatrist, is often indispensable in preparing for trial, and reasoned that defense counsel should not have to run the risk that a defense-retained psychiatrist might be forced to become an involuntary witness for the prosecution.[65]

Although the court based its holding on the attorney-client privilege, its rationale bordered on an effective assistance of counsel analysis. The court was concerned that allowing the prosecution's use of a defense-retained expert would endanger counsel's ability to represent his client.[66] Some courts have, in fact, recognized that there is often a fine line between the effective representation by counsel and the attorney-client privilege. For example, in *State v. Mingo*,[67] discussed in-depth in the following section, the Supreme Court of New Jersey reached a result similar to that reached by the court in *Hutchinson*. In discussing the claims involving violation of the defendant's attorney-client privilege and right to effective assistance of counsel, the court stated that it regarded such rights as related, and furthermore, are used to promote criminal defendant's rights.[68]

The attorney-client privilege is limited and its scope, with respect to defense-retained experts, remains somewhat uncertain at this time. While the court in *Hutchinson* acknowledged application of the attorney-

59. Petitioner's Opening Brief at 26-27, Hutchinson v. People, 742 P.2d 875 (Colo. 1987) (No. 85SC510).

60. *Id.* at 21-25.

61. *See* COLO. REV. STAT. § 13-90-107 (1987).

62. *See, e.g.*, Miller v. District Court, 737 P.2d 834, 837 (Colo. 1987); Law Offices of Bernard D. Morley v. MacFarlane, 647 P.2d 1215, 1220 (Colo. 1982).

63. 737 P.2d 834 (Colo. 1987).

64. *Id.* at 838.

65. *Id.*

66. *Id.* at 838-39.

67. 77 N.J. 576, 392 A.2d 590 (1978), *aff'g*, 143 N.J. Super. 411, 363 A.2d 369 (1976).

68. 77 N.J. at 584, 392 A.2d at 594.

client privilege in similar circumstances,[69] the court chose not to address its application in the instant case. The court chose instead to base its decision on the right to effective assistance of counsel.

III. INSTANT CASE

A. *Majority Opinion*

The court first examined the scope of the right to assistance of counsel as set forth in both the Colorado Constitution and the United States Constitution.[70] The court stated that the right to counsel, which is interpreted as the right to effective assistance of counsel, is a fundamental component of the criminal justice system. It affects the defendant's ability to assert other rights he may have, and ultimately affects the defendant's right to a fair trial.[71]

The right to effective assistance of counsel imposes certain affirmative duties upon defense counsel, including a duty of loyalty to the client, a duty to consult with the client, and a duty to inform the client of important developments in the case.[72] Counsel's duty to adequately investigate his client's case is of paramount importance. This is largely because without adequate pre-trial investigation of the factual and legal issues, assistance of counsel is rendered virtually ineffective.[73]

The court recognized that adequate pretrial investigation and preparation often requires consultation with an expert, which as the court emphasized, may not only be desirable but "absolutely vital."[74] The court stressed that the effectiveness of an expert's assistance is dependent in large part upon a relationship of trust, loyalty and confidentiality between the expert and the defendant.[75] Such a relationship promotes a full and frank exchange, which better enables counsel to honestly and accurately assess his client's case.[76] Supporting this reasoning is the court's reference to statements made by the handwriting expert who testified that he attempted to establish a working relationship with the defendant by first sending a letter of introduction and then later assuring the defendant that he represented the defense counsel and was on his side.[77]

Recognizing that the assistance of an expert may be a crucial element of the right to effective assistance of counsel, the court determined that the prosecution should not be permitted to intrude upon the expert and defense relationship as it might inhibit or deter counsel from consulting with an expert. The court maintained that permitting such a result would only marginally promote the truth seeking function of the

69. Hutchinson v. People, 742 P.2d 875, 884 (Colo. 1987).
70. *See* COLO. CONST. art. II, § 16; U.S. CONST. amend. VI.
71. 742 P.2d at 880.
72. *Id.* at 881.
73. *Id.* (quoting People v. White, 182 Colo. 417, 421-22, 514 P.2d 69, 71 (1973)).
74. *Id.*
75. *Id.* at 882.
76. *Id.*
77. *Id.* at 879.

system while severely damaging defense counsel's ability to provide effective assistance.[78]

The court found support for its decision from two cases in other jurisdictions. In *State v. Mingo*,[79] the Supreme Court of New Jersey held that the prosecution's use of a defense-retained handwriting expert in a rape case violated the defendant's right to effective assistance of counsel.[80] As in the instant case, the defense decided not to call the expert as a witness, even though the state was fully capable of retaining its own expert.[81] The court in *Mingo* stressed that defense counsel must be permitted full investigative latitude in developing his client's case, which should not be restricted by providing the state with damaging information.[82]

Similarly, in *United States v. Alvarez*,[83] the Third Circuit held that the prosecution's use of a defense-retained psychiatrist in a competency proceeding violated the defendant's "sixth amendment attorney-client privilege."[84] As in *Mingo*, the court determined that defense counsel must be free to make an informed judgment with respect to retaining an expert without running the risk of creating a potential government witness.[85]

In *Hutchinson*, the Colorado Supreme Court emphasized that its holding is of a limited nature and does not extend to rebuttal of experts or of non-expert witnesses.[86] The court maintained that claims of ineffective assistance of counsel must usually be considered on a case-by-case basis and that a showing of prejudice is required to warrant relief.[87] The court adopted the test set forth in *Strickland v. Washington*,[88] which requires a court to determine whether there is a reasonable probability that, absent the improper use of the witness, the fact-finder would have a reasonable doubt of the defendant's guilt.[89]

Applying those standards to the instant case, the court determined that there was a reasonable probability that the defendant would not have been convicted, but for the prosecution's use of the defense-retained handwriting expert.[90] It found that the defendant had not waived his right to effective assistance of counsel, that the defendant was not

78. *Id.* at 882.
79. 77 N.J. 576, 392 A.2d 590 (1978).
80. 77 N.J. at 587, 392 A.2d at 595. As the *Hutchinson* court notes, however, the prosecution's use of the defense expert was harmless error as the expert's testimony was cumulative. Hutchinson v. People, 742 P.2d 875, 883 n.3.
81. 77 N.J. at 580-81, 392 A.2d at 591-92.
82. *Id.* at 582, 392 A.2d at 592.
83. 519 F.2d 1036 (3d Cir. 1975).
84. *Id.* at 1046-47. The *Hutchinson* court states that the holding in *Alvarez* is based upon the "Sixth Amendment attorney-client privilege" as the *Alvarez* court essentially subsumed the two claims. *Hutchinson*, 742 P.2d at 883.
85. 519 F.2d at 1036, 1047 (quoted in *Hutchinson*, 742 P.2d at 883).
86. 742 P.2d at 885-86.
87. *Id.* at 886.
88. 466 U.S. 668 (1984).
89. 742 P.2d at 886 (citing *Strickland*, 466 U.S. at 695).
90. *Id.* at 887.

uncooperative with the prosecution's experts while assisting the defense's experts, and that the defense's expert testimony was damaging.[91] Also, there was no compelling justification for the prosecution's use of the defense expert as there was no indication that the prosecution was unable to retain its own competent expert.[92] Hence, the court reversed the defendant's conviction and remanded the case for a new trial.[93]

B. *Dissenting Opinion*

In the dissenting opinion, Justice Vollack argued that the case could have been decided under Rule 16 of the Colorado Rules of Criminal Procedure and the attorney-client privilege,[94] thus avoiding construction of the sixth amendment right to effective assistance of counsel. Justice Vollack argued that the defense expert's report was discoverable under Rule 16 and that the prosecution's use of the expert did not violate the attorney-client privilege. In addition, the defendant's rights were protected because the trial court limited the expert's testimony by excluding any confidential communications between the expert and the defendant.[95]

IV. ANALYSIS

Prosecutorial discovery is a relatively recent development in criminal law and courts will continue to confront new and different issues regarding the breadth and scope of permissable discovery. Today many of the limitations which have traditionally afforded the defendant some measure of protection have greatly diminished and are often ineffective barriers to broad discovery requests.

In response to the trend toward greater prosecutorial discovery, the court in *Hutchinson* applied what is also a developing trend in criminal law — the theory that the sixth amendment right to effective assistance of counsel can provide a constitutional basis which precludes the prosecution's use of a defense-retained expert in certain circumstances. The theory is not completely novel, but merely a logical extension of the *Mingo*[96] and *Alvarez*[97] decisions.

The right to effective assistance imposes certain affirmative duties upon defense counsel, such as the duty to adequately prepare for and investigate the client's case.[98] Realistically, however, factors external to the conduct and performance of defense counsel may adversely affect counsel's ability to provide effective assistance. For example, in *Hutchin-*

91. *Id.* at 886-87.
92. *Id.* at 887.
93. *Id.*
94. *Id.* at 887 (Vollack, J., dissenting).
95. *Id.* at 888-91 (Vollack, J., dissenting).
96. 77 N.J. 576, 392 A.2d 590 (1978).
97. 519 F.2d 1036 (3d Cir. 1975).
98. *See supra* text accompanying notes 71-72.

son, such a factor was the conduct of the prosecution. While it is essential that the prosecution obtain the necessary facts of the case, the prosecution should not be permitted to undermine defense counsel's efforts to fulfill his duties and responsibilities to his client. In *Hutchinson*, the court has taken a positive step forward in ensuring that the defendant is afforded his constitutional rights.

Perhaps the ultimate strength of the opinion is the limited holding. The court has not created a *per se* rule which prohibits the disclosure and use of a defense-retained expert. Instead, the court maintained that cases involving claims of ineffective assistance of counsel must focus on the facts of the individual case, and must show prejudice to the defendant resulting from the violation in order to obtain relief. The decision also requires a court, in determining whether the prosecution's use of the defense expert is justified, to determine if a compelling justification exists.[99] In *Hutchinson*, there was no compelling justification for the prosecution's use of the defense-retained handwriting expert. However, the court's decision does not in any way foreclose the possibility that a compelling justification may indeed mandate a different result.

In its Petition for Rehearing,[100] the prosecution argued that the court's decision has turned the sixth amendment right to effective assistance of counsel on its head and that the expansive nature of the decision has startling implications.[101] Ironically, the prosecution presented two hypotheticals which, instead of illustrating the potential flaws of the opinion, tended to reinforce its strength. In one hypothetical, the prosecution raised the issue that if it learned of the consistencies between the spelling errors made by the defendant and by the forger, and subsequently conducted an additional examination to confirm such evidence, the defendant could challenge the admissibility of the subsequently derived evidence as it was the fruit of the prosecution's "violation of his sixth amendment right to consult and silence his experts."[102] The facts presented by the hypothetical clearly do not come within the protection afforded under *Hutchinson*. *Hutchinson* does not extend to evidence obtained through an independent examination conducted by an expert independently consulted by the prosecution. Instead, it focuses on the prosecution's direct use of a defense-retained expert in its case-in-chief. The fact that the prosecution's subsequent investigation reveals the same information as a prior defense investigation, does not in any way violate the rule set forth in *Hutchinson*.

The prosecution presented another hypothetical which involved actions concerning drunk driving.[103] The prosecution hypothesized that if a defense-retained expert happens to conduct an examination of the defendant's blood or breath sample, the prosecution may later be pre-

99. 466 U.S. 668 (1984).

100. Respondent's Petition for Rehearing, Hutchinson v. People, 742 P.2d 875 (Colo. 1987) (No. 85SC510).

101. Record at 2-3, Hutchinson v. People, 742 P.2d 875 (Colo. 1987) (No. 85SC510).

102. *Id.* at 6.

103. *Id.*

cluded from presenting any evidence regarding the defendant's state of intoxication.[104] However, if the only evidence as to the defendant's intoxication is the sample preserved and examined by a defense-retained expert, then there is a compelling justification for the prosecution's use of both the information obtained by the defense expert himself and also the use of the defense expert himself.

While the court has created a constitutional basis precluding the prosecution's use of a defense expert in its case-in-chief, the decision imposes sufficient limitations. These limitations effectively alleviate any abuse or injustice which might otherwise result.

V. CONCLUSION

In *Hutchinson*, the court expanded the traditional concepts of the right to effective assistance of counsel. Since its inception, the Constitution has been subject to a considerable amount of interpretation and expansion, some of which has been positive and some negative. The court's decision in *Hutchinson* is manifestly positive, as it affords the defendant a constitutional shield from what is already an overwhelming arsenal of prosecutorial power.[105] In the dissenting opinion set forth in *Williams v. Florida*,[106] Justice Black maintained that the Bill of Rights, taken as a whole, is "designed to shield the defendant against state power," and although this undeniably makes the prosecution's job much more difficult, this principal is imperative to ensure that the defendant is not wrongfully deprived of his individual liberty.[107]

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104. *Id.*

105. For a discussion of the investigatory advantages enjoyed by the prosecution, see Allis, *Limitations on Prosecutorial Discovery of the Defense Case in Federal Courts: The Shield of Confidentiality*, 50 S. CAL. L. REV. 461, 485-88 (1977); Note, *Prosecutorial Discovery under Proposed Rule 16*, 85 HARV. L. REV. 994, 1018-19 (1972).

106. 399 U.S. 78 (1970) (Black, J., dissenting).

107. *Id.* at 112.